Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

AMERICAN LIFE & CASUALTY INSURANCE COMPANY,

Petitioner,

v.

ANNE C. TROSTEL, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1933, Congress outlawed the use of gold clauses in commercial transactions. In 1977, Congress reauthorized their use, but only if the gold clause obligation was "issued after October 27, 1977." 31 U.S.C. § 5118(d)(2). In this case, the Eighth Circuit held that a standard assignment in 1990 of a 1917 lease containing a gold clause constituted an "obligation issued after October 27, 1977" under Section 5118(d)(2), thus "reviving" the previously unenforceable gold clause and effectively increasing the annual rent under the lease by almost 20 times. The questions are:

1. Did the Eighth Circuit err in interpreting the words "obligation issued after October 27, 1977" in Title 31, United States Code, Section 5118(d)(2) to apply to a standard corporate reassignment of a lease, contrary to the plain language of the statute, its purpose and intent, and the decisions of another Court of Appeals and a State court of last resort?

2. Did the Eighth Circuit err in interpreting Title 31, United States Code, § 5118(d)(2), a statute intended simply to allow contracting parties to choose to include a gold clause in their contracts, so broadly that any transfer of an existing obligation immediately reinstates a dormant gold clause, notwithstanding that this result was concededly not intended by the parties and was even expressly disavowed in the transfer?

PARTIES TO THE PROCEEDING

American Life and Casualty Insurance Company is the Petitioner. Anne C. Trostel, Harry A. Holman, Jr., H.L. Van Metre, Charles H. Van Metre, Dorothy Hurley, Terrance M. Hurley, Cmdr., and Carol Sabey are the Respondents.

RULE 29.6 STATEMENT

American Life and Casualty Insurance Company (ALCIC), now known as Conseco Annuity Assurance Company (CAAC), owns 98% of Vulcan Life Insurance Co. CAAC's parent is Jefferson National Life of Texas, which is wholly owned by CIHC Incorporated. CIHC Incorporated is wholly owned by Conseco, Inc. Conseco, Inc. is a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

American Life & Casualty Insurance Company ("American Life") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, dated February 23, 1999, is reported at 168 F.3d 1105 (8th Cir. 1999) ("*Trostel III*") and is reprinted in the Appendix hereto ("App.") at 1a. The opinion and order of the District Court for the Southern District of Iowa, dated July 1, 1998, is unreported and is reprinted in the Appendix at 10a. The order of the Supreme Court of the United States, dated June 22, 1998, denying a petition for writ of certiorari is reported at 118 S. Ct. 2359 (1998) and is reprinted in the Appendix at 18a. The opinion of the United States Court of Appeals for the Eighth Circuit, dated January 15, 1998, is reported at 133 F.3d 679 (8th Cir. 1998) ("*Trostel II*") and is reprinted in the Appendix at 19a. The order of the Supreme Court of the United States, dated February 18, 1997, granting a petition for writ of certiorari, vacating the judgment and remanding the case for further consideration is reported at 519 U.S. 1104 (1997) and is reprinted in the Appendix at 28a. The opinion of the United States Court of Appeals for the Eighth Circuit, dated August 14, 1996, is reported at 92 F.3d 736 (8th Cir. 1996) ("*Trostel I*"), and is reprinted in the Appendix at 29a. The opinion of the District Court for the Southern District of Iowa, dated September 29, 1995, is unreported and is reprinted in the Appendix at 45a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1999. App. 1a. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 5118(d)(2) of Title 31, United States Code, provides: "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977."

STATEMENT OF THE CASE

1. This "gold clause" case has produced three separate decisions by the Court of Appeals for the Eighth Circuit and has been before this Court on two prior occasions. *See Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996) ("*Trostel I*"), *vacated*, 519 U.S. 1104 (1997); *Trostel v. American Life & Cas. Ins. Co.*, 133 F.3d 679 (8th Cir.) ("*Trostel II*"), *cert. denied*, 118 S. Ct. 2359 (1998); *Trostel v. American Life & Cas. Ins. Co.*, 168 F.3d 1105 (8th Cir. 1999) ("*Trostel III*"). When the case was last before this Court on a petition for writ of certiorari, it was in an interlocutory posture, and the petition was denied. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"); *see generally* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE § 4.18 (1993). Additionally, while this case was pending before the Eighth Circuit, the Court of Appeals for the Ninth Circuit came to a contrary result in a strikingly similar case. *See Grand Ave. Partners, L.P. v. Goodan*, 160 F.3d 580 (9th Cir. 1998). Accordingly, there is a conflict in the circuits on an important issue of federal law.

2. At the heart of this case is a "gold clause" contained in a 99-year ground lease on a parcel of commercial property located in Des Moines, Iowa. The gold clause provides as follows: "[A]t the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." App. 57a. When the lease was entered into in 1917,

gold clauses were commonly included in leases, government and corporate bonds, and other long-term obligations to protect the parties from fluctuations in the value of the dollar. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935) (railroad bond); *Perry v. United States*, 294 U.S. 330 (1935) (government bond); *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324 (1937) (lease). The original lease called for an annual rent of $12,000. The lease was amended, however, in 1930 to increase the rent to $23,000 per year, and that amount was paid by the lessee and accepted by the lessor until December 1993, when Respondents, the successors in interest to the original lessor, abruptly demanded that Petitioner pay its rent in United States gold coin of the 1917 standard of value, which amounted to an annual rent of approximately $450,000 – almost 20 times the face amount.

The 1917 lease also contains an assignment clause, which grants to the lessee "the right to transfer or assign [the] lease" and provides that such an assignment, upon recordation and notice to the lessor, releases the assignor-lessee from personal liability under the lease. App. 57a. Thus, the lessor's *contemporaneous* consent to an assignment of the lease is not required. Rather, under the assignment clause of the original lease, the lessor effectively consents to future assignments of the lessee's interest, and to the release of the assignor-lessee from liability.

3. Responding to the widespread economic distress caused by the Great Depression, Congress enacted in 1933 a Joint Resolution declaring all gold clauses "against public policy" and providing that any obligation containing such a clause would be discharged upon payment "dollar for dollar" in United States currency. Joint Resolution of June 5, 1933, ch. 48, 48 Stat. 112, 113 (1933). This Court upheld the constitutionality of the measure insofar as it invalidated gold clauses in private obligations. *See Norman v. Baltimore & O.R. Co., supra* (railroad bonds); *Holyoke Water Power Co. v. American Writing Paper Co., supra* (private leases). In *Norman*, this Court interpreted gold clauses not as gold commodity contracts requiring payment *in specie*, but rather as gold value contracts, requiring payment in currency in the amount

necessary to purchase the original amount of gold that the rent would have purchased at the contract date. As Professor Dam puts it, the Court interpreted gold clauses "as merely requiring payment of the present day currency equivalent of the promised gold coin." Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. CHI. L. REV. 504, 518 (1983).

In 1977, Congress amended the 1933 Joint Resolution, authorizing the use of gold clauses in contractual obligations incurred after October 27, 1977. Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (1977) (codified at 31 U.S.C. § 5118(d)(2)). Congress subsequently recodified the 1933 Joint Resolution, as amended in 1977, to read as follows:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

31 U.S.C. § 5118(d)(2).

As discussed below, following the Court of Appeals' initial decision in this case, Congress twice amended Section 5118(d)(2). The first amendment, enacted in September 1996, provided that old gold clauses can be revived in post-1977 assignments and novations only if all parties to the new agreement "specifically agree" to include the gold clause. Pub. L. No. 104-208, § 2609 (1996). The second amendment, enacted in October 1997, repealed the 1996 amendment. Pub. L. No. 105-61, § 641 (1997).

4. Petitioner American Life became the lessee in August 1990 through a standard assignment from its corporate parent, The Statesman Group ("Statesman"). It is undisputed that Statesman's 1990 assignment of the lease to Petitioner was effectuated for reasons wholly internal to the organization. Respondents were not signatories to the 1990 assignment agreement, which "provided that Statesman does hereby sell, transfer, assign and setover unto [American Life] the leasehold estate more particularly described in that certain lease dated June 27, 1917." *Trostel I*, App. 34a (internal quotations

omitted). The document also provided that American Life "hereby accepts, assumes, and agrees to be bound by all of the terms and conditions to be kept, observed and performed by the lessee in said lease . . . from and after October 1, 1990." *Trostel I*, App. 34 (internal quotations omitted).

5. By letter dated December 27, 1993, Respondents demanded that Petitioner pay its rent in gold coin of the 1917 standard of value. Petitioner rejected Respondents' demand for a twenty-fold increase in its rental payments, and on July 29, 1994, Respondents initiated this action to enforce the gold clause. Respondents based their claim entirely on the 1990 assignment agreement between Petitioner and its corporate parent, Statesman. In support of their claim, Respondents relied entirely upon *Wells Fargo Bank, N.A. v. Bank of Am. NT & SA*, 38 Cal. Rptr. 2d 521 (Cal. Ct. App. 1995) and *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990), both of which held that a post-1977 assignment of a pre-1933 lease containing a gold clause constituted a "novation" of the lease, thus rendering the gold clause binding and enforceable against the new lessee.

The district court rejected Respondents' arguments and entered summary judgment in favor of Petitioner. The court, "respectfully disagree[ing] with the basic premise" of the *Wells Fargo Bank* and the *Fay Corp.* cases, held that the 1933 Joint Resolution had voided all existing gold clauses and that the gold clause at issue here had thus been, "in effect, erased from the 1917 lease." App. 55a. Incorporating the 1917 lease by reference into the 1990 assignment agreement therefore could not and did not revive the gold clause. Rather, "[r]eactivation of the gold clause in a post-1977 Lease would require an overt agreement between the lessor and lessee to do so." App. 56a. And here there was no such agreement; indeed, the 1990 assignment was "not undertaken with an intent to change the terms of the lease, but rather for reasons internal to the organization of Statesman." App. 52a n.1.

6. The Eighth Circuit reversed. *Trostel I*, App. 29a-45a. The court held that the 1990 assignment agreement satisfied all the requirements of a valid novation of the lease, which under Iowa law is " 'a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty.' " *Trostel I*, App. 37a (quoting *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa 1993)). Because the gold clause in the 1917 lease "was not specifically mentioned in 1990 as being relevant or not," *Trostel I*, App. 37a, the question, according to the Court of Appeals, was whether Statesman and Petitioner could and did incorporate by reference the gold clause, along with the rest of the 1917 lease provisions, into their 1990 assignment agreement. Under Section 5118(d)(2), the parties to the 1990 assignment agreement "were legally free to incorporate a gold clause into the lease agreement at that time." *Trostel I*, App. 39a. Relying on *Fay Corp.* and *Wells Fargo Bank*, the Court of Appeals rejected the notion that the 1933 Joint Resolution had "magically erase[d] the gold clause from the 1917 lease" and concluded that "there is no reason that it could not be incorporated by reference in a new lease obligation entered into in 1990." *Trostel I*, App. 41a.

The Court of Appeals also rejected Petitioner's argument that neither of the parties to the 1990 assignment agreement, nor even the lessors, had intended to change the rent term of the lease. In support of this argument, Petitioner pointed to the undisputed facts that the parties to the 1990 assignment agreement – Statesman and Petitioner – were not even aware that the original 1917 lease contained a dormant and long-forgotten gold clause, and that Respondents themselves were not aware until 1991 that Congress had amended the 1933 Joint Resolution to permit use of gold clauses in post-1977 obligations. *Trostel I*, App. 43a. Acknowledging that "the intent of the parties controls" the interpretation of a written contract under Iowa law, the Court of Appeals concluded that, absent ambiguity in the contract's language, "intent is determined by what the contract itself says." *Trostel I*, App. 43a. The court concluded that Petitioner had unambiguously agreed in the 1990 assignment agreement "to be bound by the

terms of the 1917 lease . . . , which included an explicit gold clause," and that "the contract thus should be enforced as written." *Trostel I*, App. 43a.

Finally, the Court of Appeals held that the gold clause, specifically the phrase "present [standard of] weight and fineness," is ambiguous on whether it refers to the value of gold in 1990 or in 1917. App. 45a. Because the District Court had not addressed this issue and resolution of the ambiguity would require a factual inquiry, the Court of Appeals remanded the issue to the District Court. *Trostel I*, App. 45a.

7. On September 30, 1996, less than two months after the Eighth Circuit rendered its initial decision in this case, Congress enacted an amendment to Section 5118(d)(2) designed "to terminate unintended consequences of the 1977 law, including unfair treatment to leaseholders." 142 CONG. REC. H4755 (daily ed. May 9, 1996). The 1996 Amendment, in relevant part, read as follows:

> This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation *specifically agree to include a gold clause* in the new agreement.

Pub. L. No. 104-208, § 2609 (1996) (emphasis added).

8. Petitioner filed a timely petition for certiorari, arguing (1) that the Eighth Circuit had plainly erred in concluding that Petitioner and its parent corporation had intended in the 1990 assignment to obligate Petitioner under the gold clause and (2) that, in any event, Congress had itself specifically addressed the issue in the 1996 Amendment and had directly overruled the Eighth Circuit's decision. In light of the clear and dispositive applicability to this case of Congress' amendment to Section 5118(d)(2), this Court granted the petition, vacated the decision of the Court of Appeals, and remanded the case for reconsideration in light of the 1996 Amendment. *American Life & Cas. Ins. Co. v. Trostel*, 519 U.S. 1104 (1997). App. 28a.

9. On October 10, 1997, while the case was pending before the Eighth Circuit on remand from this Court, Congress again amended Section 5118(d)(2), this time by simply "striking 'This paragraph shall' and all that follows through the end of the paragraph." Pub. L. No. 105-61, § 641 (1997). Thus, the 1997 Amendment effectively repealed the 1996 Amendment.

10. On remand, the Court of Appeals "reinstate[d] [its] prior decision," ruling (1) that the 1996 Amendment did not affect its decision in *Trostel I* that the 1990 assignment agreement had revived the 1917 gold clause and (2) that, in any event, the 1997 Amendment should be applied retroactively to cover the 1990 assignment. *Trostel II*, App. 26a. With respect to the effect of the 1996 Amendment, the court acknowledged that "[t]he 1996 amendment required that a gold clause be specifically agreed to in order to be effective" and that "the substituted contract must therefore demonstrate explicit intent to include a gold clause in the new obligation." *Trostel II*, 24a-25a. Although the court well understood that the 1996 "amendment reflected a [congressional] desire to influence [the] outcome" of this very case, and despite the uncontested fact that none of the parties even contemplated, let alone specifically agreed, that the assignment would revive the gold clause, the Court of Appeals again concluded that the gold clause was revived solely by virtue of the 1990 assignment. *Trostel II*, App. 24a. The court reasoned that the assignment, by reference, "specifically included each clause of the original contract" and that this fact alone demonstrated "the parties' intent to agree to include . . . the gold clause, in the new agreement created in 1990 . . . . " *Trostel II*, App. 25a, 26a. The Eighth Circuit also rejected Petitioner's argument that the *lessors* could not possibly have "specifically agreed" to the inclusion of the gold clause in the 1990 assignment, given the uncontested fact that "the lessors did not even realize that they could demand payment under the gold clause until 1991." *Trostel II*, App. 26a. According to the Court of Appeals: "The original lessor agreed in 1917 to all future assignments of the lease, . . . and thus there was no

need for them to agree to the gold clause contemporaneously with the 1990 novation." *Trostel II*, App. 26a.

In reinstating its prior decision, the Court of Appeals also relied upon the 1997 Amendment to Section 5118(d)(2). The court rejected Petitioner's argument that under this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the statute could not be given retroactive effect. App. 22a-23a.

11. Although the Court of Appeals' decision in *Trostel II* was interlocutory in nature, Petitioner filed a timely petition for certiorari in this Court. The petition was denied, 118 S. Ct. 2359 (1998), App. 18a, and the case returned to the district court for resolution of the question whether the parties intended the term "present standard" to mean the value of gold in 1917 or 1990.

12. On March 17, 1997, Petitioner assigned the lease to its sister corporation, Vulcan Life Insurance Company ("Vulcan"). Under the 1997 assignment agreement, the parties "expressly disclaim[ed] any intent to sell, transfer, assign, setover or otherwise comply with" the gold clause. App. 59a. This latest assignment further provided that the "Lease (excepting the Gold Clause) is in full force and effect." App. 61a. The 1997 assignment agreement was duly recorded, although Respondents filed a written objection to its recordation.

13. On remand, the district court granted summary judgment for Respondents, holding that the phrase " 'present standard of weight and fineness' means the standard as of 1917." App. 15a. Although the district court could find "no evidence of the intent of the parties concerning this phrase in either 1917 or 1990," it concluded that "two factors indicate that the phrase refers to the standard as of 1917." App. 15a-16a. The two factors relied upon by the district court were (1) that "[t]he purpose of the gold clause was as a primitive form of [price] indexation," and (2) that the standard of weight and fineness of gold established by Congress in 1900 was 25.80 grains of nine-tenths fine gold as equaling

one dollar. App. 16a (internal quotations omitted). The district court did not explain how these "factors" supported its conclusion.

Nor did the district court dispute Petitioner's point that it would have been utterly irrational for Petitioner and its parent corporation to have intended to use the 1917 standard of value. The parties agree that to calculate the amount of rent due under a gold clause, one must divide the face amount of the rental obligation by the price of an ounce of gold at the time specified in the contract. Applying this formula to this case, the face amount of the annual rental obligation ($23,000) is to be divided either by the price of gold in 1917 ($20.67 per ounce) or by the price of gold as of the date of the assignment agreement between Petitioner and Statesman, August 15, 1990 ($398 per ounce). If the 1917 value of gold is used, Petitioner's rental obligation is 1,112 ounces of gold per year, which at the price of gold in August of 1990 amounts to almost $450,000. If the August 1990 value of gold is used, Petitioner's rental obligation is 57.7 ounces of gold per year, which at the price of gold in August 1990 is equal to the agreed-upon annual rent of $23,000. *See Trostel III*, App. 6a n.3. Thus, using the 1917 value of gold necessarily attributes to Statesman and Petitioner the wholly irrational intention to raise Petitioner's own rent, unilaterally and gratuitously, by a factor of 20 times. Using the 1990 standard of value, in contrast, would not yield a windfall to either party, but would merely have protected the lessor from *future* depreciation in the value of the dollar. The district court, however, opted for the economically irrational interpretation on the theory that it was "equally irrational for them to revive the gold clause in 1990 at all." App. 16a.

The district court also held that Petitioner's 1997 assignment of the lease to Vulcan was not effective to eliminate the lessee's obligations under the gold clause. The district court concluded that "American Life may not unilaterally modify the terms of the 1917 lease by assignment, assumption, or novation." App. 16a. The court made no effort to explain how the 1997 assignment differed from the 1990 assignment,

which modified the lease to incorporate by reference the gold clause.

The district court entered judgment against Petitioner for past-due rent in the amount of 5,928.66 Troy ounces of fine gold, which was worth $1,757,255 at the closing price of gold on the date of judgment (July 1, 1998) and ordered Petitioner to "pay future rent in the monthly amount of 92.72 Troy ounces of fine gold," which was worth $27,482 at the closing price of gold on that date. App. 17a. Petitioner American Life's annual rent under this formula, therefore, is $330,000, compared to Statesman's annual rent of $23,000.[1]

14. The Court of Appeals affirmed. Framing the issue as "whether 'present standard' means the value of gold at the time of the original lease in 1917 or at the time of the novation in 1990," *Trostel III*, App. 5a, the Court of Appeals concluded that the parties to the 1990 assignment agreement intended the 1917 value of gold to govern their rental payments. Although the court acknowledged Petitioner's argument that "it would have been irrational for [Petitioner] to have intended the 1917 standard to apply when it assumed its obligations under the 1990 novation," the court did not dispute or otherwise address this point. Rather, the court simply asserted, without elaboration, that because the parties to the 1990 assignment agreement had incorporated the gold clause from the 1917 lease, "the intent of the parties to the 1917 lease therefore governs the interpretation of the meaning of 'present standard' in the gold clause." *Trostel III*, App. 8a (citing *Gendler Stone Prods. Co. v. Laub*, 179 N.W.2d 628, 631 (Iowa 1970)). The Court of Appeals further concluded that the 1917 parties intended the term "present standard" to mean, not surprisingly, the 1917 standard of value of gold. As the court noted, " '[p]resent' implies an existing standard, and the 1917 parties could have used other language if they had

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[1] The amount of the annual rent as of the date of judgment was less than that at the time of the 1990 assignment because the price of gold declined from $398 an ounce on August 15, 1990 to $296 an ounce on July 1, 1998.

intended 'present standard' to be a shifting standard (such as 'the then applicable standard')." *Trostel III*, App. 8a. The court also noted that "[t]he only way for the gold clause to serve its function to protect the lessors against inflation is to use the 1917 value of gold." *Trostel III*, App. 8a-9a.

The Court of Appeals also rejected Petitioner's argument that the gold clause was eliminated from the lease in 1997 when Petitioner assigned the lease to its sister corporation, Vulcan. Noting that " 'one party to a contract cannot alter its terms unilaterally or without assent of the other party,' " *Trostel III*, App. 9a (quoting *Davenport Osteopathic Hosp. Ass'n v. Hospital Serv., Inc.*, 154 N.W.2d 153, 157 (Iowa 1967)), the Court of Appeals held that the 1997 assignment agreement did not transfer the gold clause obligation to Vulcan, but that Petitioner remains obligated under it.

REASONS FOR GRANTING THE WRIT

In 1933, Congress outlawed "gold clauses" in contracts, a measure that was designed to provide relief to debtors and allow them to satisfy their obligations in devalued United States dollars during the Great Depression. In 1977, Congress passed legislation designed simply to reauthorize contracting parties to include "gold clauses," if desired, in any obligation "issued after October 27, 1977." 31 U.S.C. § 5118(d)(2). In this case, the Eighth Circuit interpreted the 1977 amendment to mandate the incorporation of a gold clause contained in a 1917 corporate lease into a 1990 reassignment of that lease from a corporate parent to its subsidiary. The lower court reached this result despite the fact that no party – neither the assignor, the assignee, nor the lessor – evinced any intent to "issue" a new obligation including a gold clause. Indeed, it is undisputed that none of the parties were even aware that the gold clause was in the 1917 lease.

The Eighth Circuit came to this conclusion by applying state contract law to read the word "issued" out of the federal statute. The Court of Appeals should have looked to the plain language, structure, and purpose of the 1977 statute to arrive at a uniform, federal interpretation of the phrase "obligation

issued after." In a commercial setting, the verb "issue" refers to "[t]he first delivery of an instrument to a holder or remitter." Black's Law Dictionary (6th ed. 1990) (citing U.C.C. 3-102(1)(a)). The structure and purpose of the 1977 amendment, as well as its limited legislative history, all indicate that it was meant to apply only to new obligations in which the parties consciously chose to include a gold clause. The relation of the amendment to the pre-existing text, its plain language, and its history all evince a purpose to leave unaffected pre-1977 gold clauses that had been rendered moribund by Congress' action in 1933 and this Court's decision upholding that action in *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935).

Had the Eighth Circuit looked to the proper instruments of statutory interpretation, it would have concluded that the issuance of a new obligation under this statute must, as a matter of federal law, be a knowing and intentional adoption of a "gold clause," whatever state law contract device is used as the vehicle to do so. Both the Ninth Circuit Court of Appeals and the Alaska Supreme Court have refused to read the 1977 amendment to revive gold clauses based on the simple transfer of pre-1977 contracts. *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377 (9th Cir.), *cert. denied*, 519 U.S. 864 (1996); *Gold Bondholders Protective Council v. Atchison*, 649 P.2d 947 (Alaska 1982). Moreover, a recent decision of the Ninth Circuit in a gold clause case involving a lease further underscores that a rule different from the one applied by the court below obtains in the Ninth Circuit. *Grand Avenue Partners v. Goodan*, 160 F.3d 580 (9th Cir. 1998).

The issue is an important one, worthy of this Court's review. There are untold numbers of leases, bonds, and other instruments that contain gold clauses. Under the Eighth Circuit's erroneous ruling, any transfer of these instruments constitutes the unwitting issuance of a new obligation, revivifying a long-dormant gold clause. And given the Court of Appeals' ruling that the lessor's contemporaneous, express consent to an assignment is not necessary to *incorporate* (and thus to revive) a gold clause, but is necessary to *disincorporate* the gold clause (and thus to prevent it from reviving), the

commercial market for real property covered by such long-term leases likely either will be frozen entirely or will be dictated by lessors armed with ancient gold clauses and this decision.

The commercial disruption of this ruling is amplified by the Eighth Circuit's erroneous conclusion that the payment due under the exhumed gold clause is calculated by the 1917 value of gold – a ruling which in this case meant that Petitioner and its corporate parent allegedly intended to increase Petitioner's own rent by almost 20 fold. Thus, under the Eighth Circuit's view, a 1990 transfer "issued" an obligation based on the value of gold in 1917. Congress did not intend to create this kind of disruption in a simple statute that was designed to allow parties more freedom to structure their economic relations.

I. THE DECISION BELOW IS IN CONFLICT WITH THE UNIFORM UNDERSTANDING OF COURTS APPLYING SECTION 5118(d)(2) TO LONG-TERM DEBT OBLIGATIONS AND A RECENT DECISION OF THE NINTH CIRCUIT INVOLVING A LEASE SIMILAR TO THAT AT ISSUE IN THIS CASE.

Under Section 5118(d)(2), Petitioner could not lawfully be bound by the gold clause unless it was contained in "an obligation issued after October 27, 1977." The central premise, therefore, of the decision below is that the assignment agreement between Petitioner and Statesman constituted a novation – that is, "a new lease obligation entered into in 1990." *Trostel I*, App. 41a. Thus, the Court of Appeals held that in August 1990 Statesman and Petitioner entered into a "new lease" in which Statesman transferred to its wholly-owned subsidiary a "new obligation" that Statesman itself did not have[2] – an obligation to pay its monthly rent, at the option

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[2] As the Court of Appeals acknowledged, the 1990 assignment agreement "did not purport to transfer [Statesman's] *own* obligations" under the lease, but instead transferred to Petitioner "the terms and

of the lessor, " 'in gold coin of the United States of America, of or equal to the present standard of weight and fineness.' " *Trostel I*, App. 30a (quoting 1917 lease). In reaching this conclusion, the Eighth Circuit made no reference to the plain language of the statute, nor did it give any consideration to the overriding purpose of the 1977 amendment, which was merely to permit " 'gold clause *contracts entered into* after the enactment of the bill,' " as opposed to affecting pre-existing contracts in any way. *Rudolph v. Steinhardt*, 721 F.2d 1324, 1330 (11th Cir. 1983) (quoting 123 CONG. REC. 635 (1977) (statement of Sen. Helms) (emphasis added by Eleventh Circuit)).

Under the Eighth Circuit's reasoning, any standard assignment of a pre-1977 contract revives an otherwise unenforceable gold obligation. Such an interpretation reads Section 5118(d)(2)'s plain language out of the statute by ignoring the requirement that there be a post-enactment meeting of the minds that a new obligation should be "issued." The plain meaning of the term "issued" is well-established and refers to "the *first delivery* of an instrument to a holder." Black's Law Dictionary (6th ed. 1990) (citing U.C.C. 3-102(1)(a)) (emphasis added). Nevertheless, the Court of Appeals interpreted the term "issued" to apply to *any* delivery or transfer of an obligation and thus dramatically expanded the scope of Section 5118(d)(2) to apply to routine transfers of pre-existing obligations. By ignoring the statute's plain language, the court below violated a cardinal principle of statutory construction: "When the words of a statute are unambiguous, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

Nor can the Court of Appeals' decision be reconciled with Congress' purpose in amending Section 5118(d)(2) in

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conditions of the 1917 lease." *Trostel I*, App. 42a (emphasis added). Similarly, "[n]othing in the 1990 . . . agreement indicated that American Life accepted only those obligations that had been legally enforceable against all previous lessees. Instead, it specifically agreed to be bound by the obligations described in the 1917 lease," which "contained an explicit gold clause." *Trostel I*, App. 42a.

1977, which was simply to reauthorize contracting parties to use – consciously and deliberately – gold clauses in their commercial transactions. The 1977 amendment was noncontroversial, and its legislative history was sparse. In the only congressional statements relating to the statute, Senator Helms, the bill's sponsor, made clear that Congress' sole purpose was simply to permit "gold clause contracts *entered into after* the enactment of the bill. It is intended to stand neutral with regard to the enforcement of gold clause obligations issued in the past." 123 CONG. REC. 635 (1977) (statement of Sen. Helms) (emphasis added). When Congress outlawed the enforcement of gold clauses in 1933, it effected a gigantic transfer of wealth from creditors to debtors. Congress, in 1977, clearly did not intend to bring about a similar enormous retransfer of wealth with respect to pre-1933 obligations by enacting a one sentence, noncontroversial amendment reauthorizing the use of gold clauses. Yet, the Eighth Circuit's interpretation of Section 5118(d)(2) will inevitably yield such a retransfer of wealth, as virtually all such long-term obligations, some of which will be in effect for decades to come, either have been or will be assigned or transferred before their extinguishment. *See Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377, 1382 (9th Cir.), *cert. denied*, 519 U.S. 864 (1996). Thus, the Court of Appeals' decision is at war with the modest purpose underlying the statute.

The Eighth Circuit was led astray from the statute's plain language and purpose by its myopic focus on Iowa contract law in interpreting a federal statute. The lower court rested its decision almost entirely on the Iowa law of contract novation, *Trostel I*, App. 37a-39a, and contract interpretation, *id.* at 42a, rather than attempting first to arrive at a uniform, federal definition of the phrase "obligation issued." Under the Eighth Circuit's approach, whether an assignment, transfer, sublease or other transaction resuscitates an otherwise moribund gold clause will depend on the vagaries of the contract law of the fifty States.

In numerous contexts, this Court has rejected such an interpretive approach to a federal statute that employs an otherwise undefined common law term. A federal court must

look to the plain meaning of the term, interpreted in light of the object of the federal legislation. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47 (1989) (citations omitted). While resort to general common law principles may be had to elucidate that plain meaning, a federal court must arrive at a uniform *federal* definition of the term in question. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998) (Title VII requires that the Court arrive at "a uniform and predictable standard" of agency liability "as a matter of federal law"); *Reves v. Ernst & Young*, 494 U.S. 56, 71 (1990) ("We are unpersuaded that Congress intended the Securities Acts to apply differently to the same transactions depending on the accident of which State's law happens to apply."); *Choctaw Indians*, 490 U.S. at 47-53 (arriving at "uniform federal" definition of word "domicile" in federal statute regarding Indian child custody proceedings). *See also SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (arriving at uniform federal definition of term "investment contract" as used in Securities and Exchange Act of 1933).

Here, the Eighth Circuit did not even undertake the enterprise of arriving at a uniform federal definition of the statutory phrase "obligation issued." Rather it let the content of that provision turn entirely on the peculiarities of Iowa law of contract and contract novation. Thus, under the Eighth Circuit's approach, in States where novation requires an independent meeting of the minds as to all new terms or where parole evidence is more liberally admitted, a different result might obtain. This cannot be what Congress intended in the 1977 amendment. Had the Eighth Circuit looked to the plain meaning of "obligation issued" in light of the federal statutory purpose, it would have concluded that "issuance" requires the knowing and deliberate creation of the gold clause "obligation" as a matter of federal law.

The Eighth Circuit's interpretation of Section 5118(d)(2) is squarely in conflict with the decisions of federal and state courts interpreting the statute in cases involving long-term debt obligations that contain gold clauses. These decisions have uniformly adhered to the plain language and purpose of

Section 5118(d)(2) and have declined to revive gold clauses contained in bonds transferred after 1977.

In *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377 (9th Cir.), *cert. denied*, 519 U.S. 864 (1996), the Ninth Circuit considered 99-year bonds issued in 1899 by the Hocking Valley Railway Company ("Hocking Valley"). The bonds contained a gold clause promising to repay the principal and interest in "*gold coin* of the United States of the *present standard of weight and fineness*." *Adams*, 80 F.3d at 1379 (internal quotations omitted) (emphasis in original). The bonds were secured by a mortgage that permitted Hocking Valley to merge with another company so long as the corporation formed by the merger assumed payment of the bonds "according to their tenor." *Id.* (internal quotation omitted). In 1930, Hocking Valley was merged into the Chesapeake and Ohio Railway Company, which in turn was merged into CSX Transportation, Inc. ("CSX"), in 1987. CSX and the bond trustee entered into a supplemental indenture in 1992 that expressly assumed the obligation to repay the Hocking Valley bonds "according to their tenor." *Id.* (internal quotation omitted).

A group of Hocking Valley bondholders brought suit seeking to enforce the gold clause contained in the 1899 bonds, arguing that the 1987 merger and the 1992 supplemental indenture constituted an "obligation issued after October 27, 1977" within the meaning of Section 5118(d)(2). Relying specifically on the decisions in *Wells Fargo Bank* and *Fay Corp.*, the bondholders argued that the supplemental indenture, by promising to repay the bonds "according to their tenor," had incorporated by reference the original gold clause.

The district court dismissed the action for failure to state a claim, and the Ninth Circuit affirmed. The Court of Appeals concluded that CSX's agreement to assume the Hocking Valley bond payments did not constitute an obligation issued after 1977. The "issuance" of the bonds occurred in 1899, and "[t]hese original debt obligations continued, and were assumed in their entirety by [CSX]." *Id.* at 1383. The Ninth Circuit specifically rejected the bondholders' claim that the supplemental indenture constituted a novation of the bond

agreement.[3] The Ninth Circuit explained: "It was the intent of the 1977 amendment [to Section 5118(d)(2)] to remain 'neutral' concerning bonds issued prior to 1977, not to render virtually all of them payable in gold, which would be the effect were Adams' doctrine of novation applied to bond obligations." *Id.* at 1382. The court reasoned that permitting the mere transfer of a pre-1933 bond contract to revive a previously unenforceable gold clause would inevitably vitiate Congress' overriding desire not to disturb pre-existing contracts. Other courts have reached the same conclusion. *See, e.g., Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry.*, 649 P.2d 947 (Alaska 1982) (giving force to plain language of Section 5118(d)(2) and rejecting attempt to revive gold clause).

The legislative purpose of the 1977 amendment to Section 5118(d)(2) is no different for pre-1933 lease agreements than for pre-1933 bond agreements. As the *Adams* court put it, Congress did not intend "to render virtually all of them payable in gold, which would be the effect were Adams' [and the Eighth Circuit's] doctrine of novation applied to" the routine assignment of such lease obligations. *Adams*, 80 F.3d at 1382. The central fact in both *Adams* and the instant case is that a contracting party's rights and obligations under a pre-1933 contract were transferred after 1977 to a third party in an agreement that incorporated the terms of the original instrument, including a gold clause, by reference. Yet, the two Courts of Appeals came to precisely opposite conclusions as to the enforceability of the gold clauses. We respectfully submit that the Ninth Circuit in *Adams* got it right and that this Court should grant certiorari in this case to resolve the

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[3] Given its prior decision in *Fay Corp.*, which applied state contract law in interpreting Section 5118(d)(2), the Ninth Circuit did not explicitly disavow the relevance of state law for interpreting the statute. Nevertheless, the court's holding adhered to the plain language of Section 5118(d)(2), which it termed "clear on [its] face," *Adams*, 80 F.3d at 1380, and to the purpose of the statute in declining to revive the gold clauses in the obligations at issue.

conflict and to correct the Eighth Circuit's erroneous application of Section 5118(d)(2).

The Eighth Circuit's decision is also in conflict with a recent decision interpreting Section 5118(d)(2) as it applies to leases. While this case was pending before the Eighth Circuit, the Court of Appeals for the Ninth Circuit decided *Grand Ave. Partners v. Goodan*, 160 F.3d 580 (9th Cir. 1998). The lease at issue in *Grand Avenue Partners* was entered into in 1926 and related to a parcel of commercial property in Los Angeles now known as the Checkers Hotel. The lease specified an annual rent of $24,000, had a 99-year term, and contained both a gold clause, which allowed the lessor to demand payment in "gold coin of 25.8 grains of gold .900 fine" and an assignment clause, which granted to the lessee the right to assign the lease and provided that "any assignment of the leasehold estate . . . shall release the assignor from all direct liability here-under . . . . " *Grand Ave. Partners, L.P. v. Goodan*, 25 F. Supp. 2d 1064, 1067 (C.D. Cal. 1996). The lease was assigned many times over the years, and in April 1994 the lessee, Sumitomo Bank of California ("Sumitomo") assigned the lease to Grand Avenue Partners ("GAP"). Relying on the *Wells Fargo Bank* and *Fay Corp.* cases, the lessor claimed that the 1994 assignment constituted "an obligation issued after October 27, 1977," which revived the gold clause under Section 5118(d)(2). The lessor demanded a 20-fold increase in rent, from $24,000 to approximately $500,000 per year.

The district court framed the issue as whether the 1994 lease assignment agreement qualified under California law as a novation, which the court (like the Eighth Circuit in this case) defined to include a substituted contract that obligates a new party and releases the old one. *See Grand Ave. Partners*, 25 F. Supp. 2d at 1067-68. In a vivid confirmation of the perverse incentives created by the *Wells Fargo Bank* case, the *Fay Corp.* case, and now this case, the lessor argued that the 1994 assignment had completely released the lessee-assignor, Sumitomo, from all liability under the lease, while the lessees, Sumitomo and GAP, argued that Sumitomo continued to be liable as a surety under the lease, notwithstanding the 1994

assignment. Seizing on the fact that the assignment clause of the original lease provided for the release of a lessee-assignor from "all *direct* liability," the district court agreed with Sumitomo that it was still liable to the lessor as a surety of the new lessee and that the 1994 assignment did not, therefore, constitute a novation.

The district court's focus on the question whether the 1994 assignment fully or only partially released Sumitomo was quite irrelevant to Section 5118(d)(2), which is only concerned with whether the assignment created "an obligation issued after October 27, 1977." Neither the lessor nor the lessees in *Grand Avenue Partners* disputed that under the 1994 assignment *GAP* assumed an obligation after the specified date. Rather, they simply disputed that GAP's obligation under the lease included the gold clause.

The Ninth Circuit affirmed in a per curiam opinion "for the reasons stated by the district court." *Grand Ave. Partners*, 160 F.3d at 581. The Ninth Circuit specifically distinguished the Eighth Circuit decision in this case, reasoning as follows:

> Unlike GAP, the lessee in *Trostel* did not dispute that a valid new obligation was formed by the assignment, but rather contended that there was no novation as to the gold clause itself because the parties did not intend to incorporate that clause into the new lease.

Id. at 581-82. The Ninth Circuit's attempt to distinguish this case is unavailing. To be sure, Petitioner in this case has never disputed that it assumed an obligation as a result of the 1990 assignment. Petitioner only disputed that the gold clause was a part of the obligation. Contrary to the Ninth Circuit's statement, however, GAP in *Grand Avenue Partners* did not dispute that it assumed an obligation as a result of Sumitomo's 1994 assignment of the 1926 lease; rather, GAP (and Sumitomo) simply denied that the assignment completely released Sumitomo from *its* obligations under the lease. And, as previously noted, the question whether the 1994 assignment fully or only partially released Sumitomo is wholly irrelevant to Section 5118(d)(2), which is only concerned with whether the assignment created "an obligation issued

after October 27, 1977." There is simply no denying, in either this case or in *Grand Avenue Partners*, that the assignees at issue in these cases assumed obligations after the specified date. But the crucial issue in these cases is whether the obligations assumed by the assignees in these cases included a revived obligation under the gold clause. And it is clear from the language and purpose of Section 5118(d)(2) that resolution of that issue depends upon whether the parties to the assignments deliberately intended to bind themselves anew under the gold clauses.

In sum, the Ninth Circuit's recent decision in *Grand Avenue Partners* is very difficult to reconcile with the Eighth Circuit's decision in this case. In rejecting the lessors' claim that Sumitomo and GAP had intended to unilaterally impose upon GAP a huge, gratuitous increase in its rental payments, the Ninth Circuit obviously decided the case correctly, but not because a technical parsing of the differing language of the assignment clauses in the *Grand Avenue Partners* case and this case truly reflects differing purposes by the respective parties to the clauses. Rather, the Ninth Circuit's decision, unlike the decision in this case, is correct because it is consonant with Congress' evident intent in Section 5118(d)(2) simply to reauthorize contracting parties to *deliberately* include gold clauses in their commercial transactions. Straightforward application of this simple statutory standard would ensure fulfillment of Congress' purpose in enacting Section 5118(d)(2) and would prevent replication of the kind of absurd result reached in this case. Accordingly, this Court should grant the petition to resolve the conflict between the Eighth and Ninth Circuits on the proper application of Section 5118(d)(2).

II. THE DECISION BELOW WILL HAVE PROFOUND CONSEQUENCES.

The decision in this case, if left standing, will have profound practical consequences for all other parties to long-term leases containing a gold clause. Such leases were commonplace before 1933, and while it is impossible to know

how many remain in effect today, it is clear that such leases are still numerous and widespread.[4]

At a minimum, the Eighth Circuit's ruling will likely ignite a modern-day gold rush, as lessors and other prospectors search court records for post-1977 assignments of pre-1933 long-term leases containing standard gold clauses and assignment clauses. In the jurisdictions covered by the Eighth Circuit, at least, finding such a lease is the equivalent, literally, of finding gold.

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[4] As the House Report accompanying the 1933 Joint Resolution stated, "in this country virtually all obligations, almost as a matter of routine, contain the gold clause." H. REP. No. 73-169, at 5 (1933). Indeed, the Court in *Norman* acknowledged that there were at least $75 billion of such obligations in 1933. *Norman*, 294 U.S. at 313. Gold clauses were a standard provision of long-term leases. *See, e.g., Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324 (1937) (13 leases containing gold clauses); *Emery Bird Thayer Dry Goods Co. v. Williams*, 107 F.2d 965 (8th Cir. 1939) (99-year lease contains gold clause); *E.E. Atkinson & Co. v. Neisner Bros., Inc.*, 258 N.W. 151 (Minn. 1935) (long-term lease in Minneapolis contains gold clause). There are innumerable examples of gold clause leases still in effect in every part of the nation. *See, e.g., Wells Fargo Bank*, 38 Cal. Rptr. 2d 521 (Cal. Ct. App. 1995) (lease with gold clause on property in Beverly Hills in effect until 2024); *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986) (lease with gold clause on property in Seattle in effect until 2028); *Equitable Life Assurance Soc. v. Grosvenor*, 582 F.2d 1279 (6th Cir. 1978) (lease with gold clause on property in Memphis in effect until 2026); *Henderson v. Mann Theatres Corp.*, 135 Cal. Rptr. 266 (Cal. Ct. App. 1976) (lease with gold clause on property in Los Angeles in effect until 2028); *Avery v. J.L. Hudson Co.*, 169 N.W.2d 666 (Mich. Ct. App. 1969) (lease with gold clause on property in Detroit in effect until 2011); Peter Kafka, *Norwest Holds Baker to the "Gold Standard,"* Minneapolis-St. Paul City Business, Oct. 11, 1996, at 1 (lease with gold clause on property in Minneapolis in effect until 2016); *Rudolph v. Steinhardt*, 721 F.2d 1324 (11th Cir. 1983) (every tenant in Miami Beach condominium subject to a lease with a gold clause that expires in 2069); *REC Centers, Inc. v. Shaughnessy*, 407 So. 2d 971 (Fla. Dist. Ct. App. 1981) (condominium unit owners in Broward County, Florida, subject to a lease with a gold clause that will expire in 2066).

Equally important and predictable are the practical consequences of the court's ruling that the lessor's contemporaneous express consent to an assignment of a pre-1933 lease is necessary to prevent an old gold clause from being incorporated (and thus revived) in the new lease agreement. In March 1997, Petitioner and its sister corporation, Vulcan Life Insurance Company, entered into a lease assignment agreement materially indistinguishable from the 1990 assignment agreement, except that the parties "expressly disclaim[ed] any intent to sell, transfer, assign, setover or otherwise comply with" the gold clause. App. 59a. Relying on the Court of Appeals' reasoning in *Trostel I*, Petitioner argued that the gold clause had been eliminated from the lease by the 1997 assignment agreement. The Court of Appeals, however, this time concluded that "one party to a contract cannot alter its terms unilaterally or without assent of the other party." *Trostel III*, App. 9a (internal quotations omitted).

Thus, under the Court of Appeals' reasoning in *Trostel III*, if Petitioner and Statesman had been aware of the gold clause in August 1990 and had specifically intended to assign the lease without reviving it, they could not have done so without the lessors' contemporaneous, express consent. The decision below, therefore, is a one-way ratchet, in which a previously meaningless and long-forgotten gold clause can be *unwittingly incorporated* (and therefore revived) by the parties to a lease assignment agreement without the lessor's contemporaneous express consent, but cannot be *deliberately disincorporated* by the parties to such an agreement without the lessor's contemporaneous consent.

The decision below will thus place such a lessor in a position to dictate the terms of any assignment of the lease. Consequently, the commercial market for real property covered by such long-term leases either will be frozen entirely or will be distorted by the demands of lessors armed with ancient gold clauses and this decision. Congress plainly did not intend its 1977 amendment to Section 5118(d)(2) to bring about such extraordinary results, and this Court, accordingly, should grant review in this case to correct the decision below.

III. THE EIGHTH CIRCUIT'S INTERPRETATION OF SECTION 5118(d)(2) LEADS TO ABSURD RESULTS.

While the Court of Appeals acknowledged that "the intent of the parties controls" the interpretation of a written contract, *Trostel I*, App. 33a, the court simply did not come to grips with undisputed facts demonstrating, with certainty, that neither Petitioner nor Statesman, nor even Respondents, genuinely intended the 1990 lease assignment agreement to obligate Petitioner under the gold clause.

There is no dispute that the only signatories to the 1990 lease assignment agreement were Petitioner and its parent Statesman, both of which entered the assignment agreement "not . . . with an intent to change the terms of the lease, but rather for reasons internal to the organization of Statesman." App. 52a n.1. Respondents were in no way involved in the 1990 transaction; their prior consent to the assignment agreement was supplied under the assignment clause of the original 1917 lease. Nor is there any dispute that both Statesman and Petitioner were unaware that the 1917 lease agreement contained the previously unenforceable and long-forgotten gold clause when they entered into the 1990 assignment agreement.[5] Respondents themselves did not learn until 1991 that the use of gold clauses had been reauthorized by Congress in 1977, and they have offered no explanation as to why they waited until December 1993 to exercise their alleged option to demand performance under the gold clause. Finally, it is

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[5] In their briefing to the Eighth Circuit in *Trostel I*, Respondents admitted that "neither Mr. Matovina nor David J. Noble even thought about whether the 1990 Warranty assignment contained a gold clause." Reply Brief of Appellants Trostel, *et al.* at 17-18. At the time of the 1990 assignment agreement, Mr. Noble was the President of both Statesman and Petitioner American Life, and Mr. Matovina was Vice President of both Statesman and Petitioner American Life. *Id.* at 10 n.7, 17 n.9. Respondents also "admit[ted] that they did not realize until 1991 their ability to demand payment in gold following the 1977 Congressional amendment." *Id.* at 16 n.8.

undisputed that the alleged agreement between Petitioner and Statesman to obligate Petitioner under the gold clause was entirely *gratuitous* – that is, Statesman and Petitioner were under no legal obligation to revive the gold clause, and they received absolutely nothing from Respondents in return for allegedly doing so.

In light of these undisputed facts, if the "intent of the parties" truly controls the interpretation of a written contract, then the 1990 assignment agreement did not contain an enforceable gold clause, and the Court of Appeals plainly erred in concluding otherwise.

The Court of Appeals compounded its error by interpreting the term "present standard" in the gold clause to mean the "1917 standard" of value of gold. The court's interpretation was premised on the notion that it is not the intent of the parties to the 1990 assignment agreement that matters, but that it is rather the intent of the parties to the original 1917 lease agreement that matters. According to the court, because the gold clause was incorporated from the 1917 lease, "the intent of the parties to the 1917 lease therefore governs the interpretation of the meaning of 'present standard' in the gold clause." *Trostel III*, App. 8a. The Court of Appeals did not explain why this is so, and it plainly is not so.

First, the court's conclusion conflicts directly with its determination in both *Trostel I* and *Trostel II* that the intent of the parties to the 1990 assignment agreement, specifically Petitioner, controls the construction of the contract. *See Trostel I*, App. 43a ("The intent of American Life to be bound by these terms, which included an explicit gold clause, is expressed in clear and unambiguous language."); *Trostel II*, App. 26a ("The terms of this assignment reveal the parties' intent to agree to include all original lease clauses, including the gold clause, in the new agreement created in 1990, thus satisfying the requirements of the 1996 amendment.").

Second, the Court of Appeals' decision simply does not make any sense. To be sure, the 1917 parties to the original lease, as the Court of Appeals noted, intended the term "present standard" to mean the 1917 value of gold. That is because the 1917 parties to the original lease executed their

agreement in the year 1917, and it made sense for them to protect themselves against the effects of inflation in subsequent years. But interpreting the term "*present* standard" in the 1990 assignment agreement to mean the value of gold in 1917 would give the Respondents the benefit, retroactively, of *past* (1917-1990) depreciation in the value of the dollar, resulting in an immediate 20-fold increase in the annual rental obligation, from $23,000 to almost $450,000 (at the August 1990 price of gold). *Trostel III*, App. 6a. Petitioner and Statesman would have agreed to calculate their rental payments by reference to the 1917 value of gold only if they intended to make an annual donation to their landlord of several hundred thousand dollars until the year 2016. A gold clause like the one forced by the court below upon the parties to the 1990 agreement is, we are certain, without precedent in the world of commerce.

In truth, if one assumes (incorrectly) that Petitioner and Statesman intended to incorporate the gold clause into their 1990 assignment agreement, it is unmistakably clear that they intended the term "*present* standard" to mean the standard of value of gold prevailing *presently* – that is, at the time of contract formation in 1990. The term "[p]resent," as the court below acknowledged, "implies an existing standard." *Trostel III*, App. 8a. And for the same reason that the 1917 parties to the original lease intended the term "present standard" to mean the existing 1917 standard of value, the parties to the "new lease obligation entered into in 1990," *Trostel I*, App. 41a, equally plainly intended the term "present standard" to mean the existing 1990 standard of value. Thus interpreted, the gold clause would not yield a windfall to either Respondents or Petitioner, but rather would simply fulfill the clause's traditional purpose of protecting the lessor from future depreciation in the value of the dollar. In resolving the ambiguity in the term "present standard," therefore, the Court of Appeals embraced the alternative interpretation that does violence to the clause's plain language and yields an absurd result, and it rejected the interpretation that adheres to the clause's plain language and yields a far more reasonable result.

In sum, Respondents' claim, and the Court of Appeals' holding, requires acceptance of the notion that Statesman and its wholly-owned subsidiary, for reasons internal to the organization of Statesman, intended (albeit *unwittingly*) in their 1990 assignment agreement to raise unilaterally and gratuitously Petitioner's own rental payments by a factor of almost 20 times. On its face, the Court of Appeals' interpretation of the 1990 assignment agreement is so implausible – indeed, preposterous – that it cannot conceivably reflect the true intentions of the parties to the contract. *See United States v. Winstar Corp.*, 518 U.S. 839, 910 (1996) (rejecting contract interpretation that would have rendered the transaction "madness for [the parties] to have engaged in"); *First Nat'l Bank v. Smith*, 331 N.W.2d 120 (Iowa 1983) (economic realities surrounding a transaction are particularly relevant in interpreting contract provisions); *McKenzie v. Eastern Iowa Tire, Inc.*, 448 N.W.2d 464, 467-68 (Iowa 1989) (same).

The parties to the 1990 assignment agreement did not deliberately include a long-forgotten gold clause in their "obligation issued after October 27, 1977," 31 U.S.C. § 5118(d)(2), and the court below plainly erred in forcing the gold clause into the parties' agreement.

IV. THE 1997 ASSIGNMENT OF THE LEASE ELIMINATED THE GOLD CLAUSE.

As previously discussed, in March 1997 Petitioner and its sister corporation, Vulcan, entered into a lease assignment agreement that was materially indistinguishable from the 1990 assignment agreement except that the parties "expressly disclaim[ed] any intent to sell, transfer, assign, setover or otherwise comply with" the gold clause. App. 59a. Relying on the Eighth Circuit's reasoning in *Trostel I*, Petitioner argued that the gold clause had been eliminated from the lease by the 1997 assignment agreement. This time, however, the Court of Appeals agreed with the argument (this time advanced by Respondents) that "one party to a contract cannot alter its terms unilaterally without the assent of the other party." *Trostel III*, App. 9a (internal quotations omitted).

The Court of Appeals' decision in *Trostel III* simply cannot be reconciled with its decision in *Trostel I*, which rejected the argument (when made by Petitioner) that the parties to the 1990 lease agreement had no power unilaterally to alter the rental obligation under the lease without obtaining the express contemporaneous consent of the lessor. The Court of Appeals acknowledged in *Trostel I* that the parties' incorporation of the gold clause in the 1990 assignment agreement did indeed alter the terms of the lessee's rental obligation. As the court put it: "Even if the previous lease did not incorporate the gold clause, the terms of the new lease created by the novation are not limited to those in the previous lease." *Trostel I*, App. 38a n.9. Similarly, the 1990 assignment agreement, according to the Court of Appeals, "did not purport to transfer [Statesman's] own obligations" under the lease, but instead transferred to Petitioner "the terms and conditions of the 1917 lease." *Trostel I*, App. 42a. And the Court of Appeals held that the lessor's contemporaneous consent to the 1990 agreement modifying the lessee's rental obligation was not necessary, for the lessor had agreed in the original 1917 lease to all future assignments by the lessee: "'The original lessor agreed in 1917 to *all future assignments* of the lease . . . and thus there was no need for them to agree to the gold clause contemporaneously with the 1990 novation." *Trostel II*, App. 26a (emphasis added).

Taken together, the Court of Appeals' decisions in *Trostel I* and *Trostel III* create a bizarre regime in which the assignor and assignee of a lease agreement are able *unwittingly* to incorporate (and thus revive) a long-forgotten, pre-1933 gold clause without the lessor's express contemporaneous consent, but are not able *deliberately* to disincorporate (and thus eliminate) such a gold clause without the lessor's express contemporaneous consent.

The Court of Appeals made no effort to distinguish the 1997 assignment agreement from the 1990 assignment agreement, nor did it mention its contrary reasoning in *Trostel I*. Surely, Petitioner cannot lose this issue no matter which side of it Petitioner takes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Anne C. Trostel; Harry A. Holman, Jr.; H. L. Van Metre; Charles H. Van Metre; Dorothy Hurley; Terrance M. Hurley, Cmdr; Mrs. Carol Sabey, Plaintiffs – Appellees, v. American Life & Casualty Insurance Company, Defendant – Appellant.

No. 98-2999

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

168 F.3d 1105; 1999 U.S. App. LEXIS 2710

January 13, 1999, Submitted
February 23, 1999, Filed

Appeal from the United States District Court for the Southern District of Iowa. 4:94-CV-70494. Honorable Harold Vietor, District Judge.

DISPOSITION: Affirmed.

COUNSEL: Counsel who presented argument on behalf of the appellant was Charles Justin Cooper of Washington, D.C. Also appearing on the brief were Michael A. Carvin and David H. Thompson.

Counsel who presented argument on behalf of the appellee was James M. Doran, Jr., of Nashville, Tennessee. Also appearing on the brief were Robert M. Holliday and John R. Caldwell.

JUDGES: Before BOWMAN, Chief Judge, WOLLMAN and MURPHY, Circuit Judges.

OPINION BY: MURPHY

OPINION:
MURPHY, Circuit Judge.

This case, now before us for the third time, involves an anti-inflationary gold clause in a lease for commercial property in downtown Des Moines. The lease was originally entered into in 1917, and the significance of its gold clause has been impacted over the years by changes in federal policy and statutory law. *See Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996) (*Trostel I*), *vacated*, 117 S. Ct. 939 (1997); *Trostel v. American Life & Cas. Ins. Co.*, 133 F.3d 679 (8th Cir.) (*Trostel II*) (reinstating *Trostel I*), *cert. denied*, 141 L. Ed. 2d 728, 118 S. Ct. 2359 (1998). The appellees are heirs of the original lessor, and in *Trostel I* we held that appellant American Life & Casualty Insurance Company (American) had assumed all the obligations in the original lease, including those related to the gold clause, when it became the lessee under a 1990 assignment agreement. *See Trostel I*, 92 F.3d at 740-41; *see also Trostel II*, 133 F.3d at 680, 682. Since appellees had exercised their option to demand that lease payments be made under the gold clause and the parties disagreed on the standard of gold to use in calculating the amount due, the case was remanded to the district court[1] to make that determination. *See Trostel I*, 92 F.3d at 743. It ruled that the 1917 standard for gold should be used to calculate the amount of lease payments rather than the 1990 standard and that a 1997 transaction entered into by American did not affect its obligations under the lease. On its appeal American challenges both decisions. We affirm.

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[1] The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

I.

In 1917 John Trostel entered into a ninety-nine year lease agreement with Morris and Jacob Joseph. *Trostel I*, 92 F.3d at 737-38. The lease provided that "at the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." *Id.* at 738.[2] Prior to the Depression, long-term leases often included gold clauses such as this to protect the lessor against inflation. *Id.* (citing *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 947 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990)). The lease gave the lessees the right to transfer or assign the lease. *Id.*

Congressional policy regarding gold clauses has shifted over time. In a 1933 joint resolution, Congress declared gold clauses to be against public policy and provided that "dollar for dollar" payments in United States currency would discharge any obligation. *Id.* (citing Joint Resolution of June 5, 1933, 48 Stat. 112, 113 (1933) (codified as amended at 31 U.S.C. § 5118(d)(2))). Congress reversed course in 1977 and amended the 1933 legislation so that it would not apply to obligations issued after October 27, 1977. *Id.* (citing Act of October 28, 1977, Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2))). This 1977 amendment allowed gold clauses to be once again enforceable when part of a new obligation.

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[2] More details about the lease and its background can be found in *Trostel I* and *Trostel II*.

American became the lessee of the property in 1990 pursuant to a recorded Warranty Assignment and Assumption (warranty agreement). 92 F.3d at 739. The warranty agreement provided that American "accepts, assumes and agrees to be bound by all of the terms and conditions to be kept, observed and performed by the lessee in [the 1917 lease]." *Id.* In 1993, the lessors demanded payment of the rental obligation from American in gold coin. *Id.* When American refused to accede to the demand, the lessors sought a declaratory judgment to enforce it. *See Trostel II*, 133 F.3d at 680. We held in *Trostel I* that the 1990 warranty agreement was a novation in which American had assumed all obligations of the original lease. The gold clause was enforceable because under Iowa law the novation amounted to a new obligation and it was incurred after the 1977 amendment to the federal statute. *Id.* at 680, 682 (citing *Trostel I*, 92 F.3d at 740-41; *Klipp v. Iowa Grain Indemnity Fund Board*, 502 N.W.2d 9, 11 (Iowa 1993); *Eitzen's Estate v. Lauman*, 231 Iowa 1169, 3 N.W.2d 546, 549-50 (Iowa 1942)).

This court remanded to the district court for further proceedings, but the parties meanwhile became engaged in efforts to seek Supreme Court review and Congressional action to advance their positions. While American's petition for certiorari was pending, it succeeded in obtaining an amendment to 31 U.S.C. § 5118(d)(2) (the gold clause statute) in 1996. The amendment was inserted in the Economic Growth and Regulatory Paperwork Reduction Act of 1996, and it provided that no obligation assumed after October 27, 1977 involving a gold clause in a preexisting lease would be enforceable unless all parties "specifically agreed to include a gold clause in the new

[post-October 27, 1977] agreement." 133 F.3d at 680. After the passage of this legislation, the Supreme Court granted certiorari, vacated *Trostel I*, and remanded the case to this court "for further consideration in light of the [1996 amendment]." *Id.* (quoting 117 S. Ct. 939 (1997)). Appellees also sought legislative action and in 1997, prior to oral argument on the remanded case, Congress proceeded to eliminate the provision it had added to the gold clause statute in 1996. 133 F.3d at 681. The parties disagreed about whether this amendment had retroactive effect. *See id.* We held that even if the 1997 amendment had only prospective effect and the 1996 amendment controlled here, the gold clause was still enforceable because American had explicitly agreed to be bound by the terms of the 1917 lease. *Id.* at 681-82. *Trostel I* was therefore reinstated, and the case remanded to the district court for it to resolve the dispute about the proper value of gold to be used in calculating the lease payments. The Supreme Court declined to review *Trostel II*. 141 L. Ed. 2d 728, 118 S. Ct. 2359 (1998).

II.

The case returned to the district court for it to determine how much the lessors were entitled to be paid under their exercise of the gold option. The lease terms entitle them to be paid in gold coin "of or equal to the present standard of weight and fineness." Although the parties agree on the value of gold in the relevant years, they disagree about whether "present standard" means the value of gold at the time of the original lease in 1917 or at the time of the novation in 1990. They agree that the monthly lease payment should be 92.72 Troy ounces of

fine gold using the 1917 value and 4.81 Troy ounces using the 1990 value.[3]

Appellees initiated the proceedings by filing motions for Entry of Order in Accordance with the Opinion of the Eighth Circuit and for summary judgment. Both sides relied on evidence already in the record to make their arguments. Appellees argued that the intent of the parties in 1917 governed; although no one with actual knowledge of that intent was still living, the historical context indicated that the gold clause was intended as a price indexing mechanism. Appellant argued that the intent of the parties to the novation in 1990 governed; although American had formed no specific intent in 1990 regarding the gold clause, it would have been irrational to have intended the 1917 value of gold to apply.

Appellant also presented an additional issue to the district court based on a 1997 transaction between it and another company. American had transferred its leasehold interest to its sister corporation, the Vulcan Life Insurance Company (Vulcan) on March 17, 1997. This transfer involved a Warranty Assignment and Assumption agreement that was substantively identical to the 1990 warranty agreement except that it "expressly disclaimed any

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[3] Translation into dollars depends upon the value of each Troy ounce of fine gold. Assuming for purposes of illustration that that value were $400, the annual lease payment would amount to $445,056 under the 1917 standard or $23,088 under the 1990 standard. Similarly, the value of the arrearages awarded by the district court, 5928.66 Troy ounces of fine gold, would vary from $2,371,464 to $123,024 depending upon the standard.

intent to sell, transfer, assign, setover or otherwise comply with" the gold clause. American argued that it was therefore no longer bound by the gold clause. The lessors argued that the transaction did not affect American's obligation under their lease.

The district court granted summary judgment to the lessors on July 1, 1998, and judgment was entered on that date. The district court concluded that there was no evidence of the intent of the parties in either 1917 or 1990, but that the historical use of gold clauses for price indexing leads to the conclusion that the 1917 value of gold should apply. The district court also held that the 1997 warranty agreement did not relieve American of its obligations under the gold clause because it could not unilaterally modify the terms of the lease. The district court ordered American to pay the lessors arrearages, including interest through June 30, 1998, in the amount of 5928.66 Troy ounces of fine gold, and to pay future monthly lease payments of 92.72 Troy ounces of fine gold.

III.

On its appeal, American contends that the district court erred in granting summary judgment to the lessors. It believes that the 1990 value of gold is the appropriate measure and that its agreement with Vulcan in 1997 eliminated the gold clause from the lease. Our review of the district court's grant of summary judgment is *de novo*. *See St. Paul Fire & Marine Ins. Co. v. Schrum*, 149 F.3d 878, 880 (8th Cir. 1998).

American argues that the 1990 value of gold should control the rent calculation because it would have been

irrational for it to have intended the 1917 standard to apply when it assumed its obligations under the 1990 novation. We have previously rejected American's theory that it did not intend to include a gold clause at the time of the 1990 novation because "the explicit terms of the [1990 novation] unambiguously suggested otherwise." *Trostel I*, 92 F.3d at 741 n.9; *see id.* at 742-43. The 1990 novation did not create a new gold clause, but rather incorporated the gold clause from the 1917 lease. *See id.* at 741-43. In 1990, American undertook all obligations of the original lessees, and the intent of the parties to the 1917 lease therefore governs the interpretation of the meaning of "present standard" in the gold clause. *Cf. Gendler Stone Prods. Co. v. Laub*, 179 N.W.2d 628, 631 (Iowa 1970) ("conduct of the assignees is of no value in determining the intention of the original makers").

There is no direct evidence in the record of the intent of the parties in 1917, but both the language and purpose of such a gold clause support using the 1917 value of gold to calculate the lease payments at issue. The gold clause, if exercised, calls for payment in gold "of or equal to the present standard of weight and fineness." "Present" implies an existing standard, and the 1917 parties could have used other language if they had intended "present standard" to be a shifting standard (such as "the then applicable standard"). Moreover, there is no dispute that the purpose of gold clauses is to protect a lessor against inflation. This protection would be meaningless if the baseline value of gold were revised anytime the lessee transferred the leasehold interest to a new obligor. The only way for the gold clause to serve its function to protect the lessors against inflation is to use the 1917

value of gold. Since the obligation American incurred in 1990 was to assume the duties of the 1917 lease, including its gold clause, it follows that the 1917 value of gold should be used to calculate the lease payments.

American argues that the gold clause was eliminated from the lease in 1997 when it attempted to assign its rights and delegate its duties under the lease to its sister corporation and they expressly agreed to disclaim the gold clause. By this transaction involving only the lessee side of the ledger, they sought to affect the rights of the lessors those on the other side of the lease. But, "one party to a contract cannot alter its terms unilaterally or without assent of the other party." *Davenport Osteopathic Hosp. Assoc. v. Hospital Serv., Inc.*, 261 Iowa 247, 154 N.W.2d 153, 157 (Iowa 1967). Under the logic of American's theory, it could have expressly disclaimed any intent to transfer the obligation to pay rent, thereby eliminating the rental obligation from the lease. The expressed intent not to transfer the gold clause meant that Vulcan did not assume it, but that did not eliminate the gold clause from the contract. Since the parties to the 1997 agreement did not intend to transfer the gold clause to Vulcan, American remains obligated under it.

IV.

In summary, we conclude that the district court did not err in granting summary judgment to the lessors. The judgment of the district court is therefore affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JUDGMENT IN CIVIL CASE
CASE NO.: 4:94-CV-70494

Anne C Trostel, et al.,

Plaintiff

v.

American Life & Casualty Insurance Company,

Defendant

_____ **JURY VERDICT.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

_____ **DECISION BY COURT.** This action came to consideration before the Court. The issues have been Granted and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: That American Life specifically perform its obligation under the lease by paying plaintiffs arrearages, including interest through 06/30/98 in the amount of $5928.66 Troy onuces [sic] of file gold, and that American Life pay future rent in the monthly amount of $92.72 Troy ounces of fine gold.

JUL 1 – 1998
Date

/s/ James R. Rosenbaum
Clerk

/s/ D. Vance
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ANNE C. TROSTEL, et al.,	*	CIVIL NO. 4-94-70494
Plaintiffs,	*	MEMORANDUM
v.	*	OPINION, RULING
AMERICAN LIFE & CASUALTY INSURANCE COMPANY,	*	GRANTING PLAINTIFFS' MOTION, AND JUDGMENT ORDERS
Defendant.	*	(Filed Jul. 1, 1998)

This specific performance case involving a gold clause contained in a 99-year commercial property lease entered into in 1917 comes back to this court on remand from decisions by the Eighth Circuit Court of Appeals in *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), *vacated*, 117 S.Ct. 939 (1997) ("*Trostel I*") and *Trostel v. American Life & Cas. Ins. Co.*, 133 F.3d 679 (8th Cir. 1998), *cert. denied*, No. 97-1706, 1998 WL 185214 (June 22, 1998) ("*Trostel II*"). *Trostel II* reinstated *Trostel I* after some legal and legislative maneuvering. Plaintiffs now move for Entry of Order in Accordance with the Opinion of the Eighth Circuit and for summary judgment. Defendant resists and oral arguments were heard. Per my request, the parties provided proposed rulings on June 26, 1998. The motion is submitted.

The motion and resistance concern the following two issues: (1) does "present standard of weight and fineness" mean the standard as of 1917 or as of 1990; and (2) what

is the effect, if any, of American Life's 1997 Warranty Assignment and Assumption to the Vulcan Life Insurance Company, specifically disclaiming the gold clause.

SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). To preclude the entry of summary judgment, the nonmovants must make a sufficient showing on every essential element of their case for which they have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Continental Grain Co. v. Frank Seitzinger Storage, Inc.*, 837 F.2d 836, 838 (8th Cir. 1988). Rule 56(e) requires the nonmoving parties to go beyond the pleadings and by affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Johnson v. Schopf*, 669 F. Supp. 291, 295 (D. Minn. 1987). The quantum of proof that the nonmoving parties must produce is not precisely measurable, but it must be "enough evidence so that a reasonable jury could return a verdict for the nonmovant[s]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Johnson*, 669 F. Supp. at 295-96.

FACTS

Trostel I and *Trostel II* recite most of the facts relevant to this motion. The following additional facts are undisputed or represent defendant's version. The lease, which was entered into in 1917, provides that "at the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." The 1990 warranty, assignment and assumption pursuant to which American Life became the lessee states that American Life agreed to be "bound by all of the terms and conditions to be kept, observed and performed by the lessee in said lease," and to "carry out and perform all of the terms and covenants on the part of the lessee under said lease." The lease further provides for interest "at the rate of 8 percent per annum, payable annually, after the same becomes due and delinquent." Finally, the lessee agrees to pay "the costs and reasonable attorneys' fees incurred by the said lessor in enforcing the covenants, agreements, terms and provisions of the lease."

Nobody involved in the negotiation of the lease in 1917 is alive; thus we have no testimony concerning the intent of the parties at that time. American Life did not form any specific intent concerning the meaning of "present standard of weight and fineness" at the time of the 1990 warranty, assignment and assumption. If "present standard of weight and fineness" means the standard as of 1917, plaintiffs are entitled to 92.72 Troy ounces of fine gold per month under the lease.

On March 17, 1997, American Life entered into a "Warranty Assignment and Assumption" agreement with

its sister corporation, Vulcan Life Insurance Company ("Vulcan") in which American Life transferred to Vulcan all of its rights and obligations under the 1990 assignment. Under the 1997 agreement, the parties "expressly disclaim[ed] any intent to sell, transfer, assign, setover or otherwise comply with" the gold clause. This latest assignment further provided that the "Lease (excepting the Gold Clause) is in full force and effect." The 1997 assignment was duly recorded, although plaintiffs filed an objection.

DISCUSSION

The first issue is the meaning of the phrase "present standard of weight and fineness." In *Trostel I*, the court states that

> The parties also disagree on the proper value of any gold payment required. American Life claims the requirement of payment in gold "of present weight and fineness" would refer to the value in 1990, rather than in 1917. The lessors believe that the value of gold in 1917 was intended. The district court did not consider this issue because it held that the gold clause could not have been revived as a matter of law. Since the term relating to "present weight and fineness" is ambiguous, resolution of the issue will involve a factual inquiry. It should therefore be addressed in the first instance by the district court.

Trostel, 92 F.3d at 743.

Plaintiffs contend that there are no genuine issues of material fact concerning the meaning of "present standard of weight and fineness." Plaintiffs argue that "present standard of weight and fineness" takes on a definite meaning in light of the Gold Standard Act of 1900 and the purpose of the clause to index for inflation. Defendants contend that the background economic reality of the 1990 transaction leads to the conclusion that "present standard of weight and fineness" must mean the standard as of 1990. Defendants contend that it would have been irrational for the phrase to mean the standard as of 1917.

In its resistance, American Life does not set forth specific facts showing that there is a genuine issue for trial as required by Fed. R. Civ. P. 56(e) and Local Rule 56.1. Instead, American Life identifies the issue and contends that *Trostel I* requires a factual inquiry, precluding summary judgment. When questioned at oral argument, American Life indicated that its evidence on the meaning of the phrase is simply the economic background of the 1990 novation. In addition, American Life's proposed order requests a conclusion and judgment that the disputed phrase means the standard as of 1990, not simply a denial of plaintiffs' motion. As a result, although the present procedural posture is plaintiffs' motion and defendant's resistance, both sides appear to agree that the issue is amenable to resolution on summary judgment.

I agree with plaintiffs' position and conclude that "present standard of weight and fineness" means the standard as of 1917. There is no evidence of the intent of the parties concerning this phrase in either 1917 or 1990. The Gold Standard Act of 1900, however, established 25.80 grains of nine-tenths fine gold as equaling one

dollar. Acts of March 14, 1900, Ch. 41 § 1, 31 Stat. 45; *Rudolph v. Steinhardt*, 721 F.2d 1324, 1325 (11th Cir. 1983). The purpose of the gold clause was as a "primitive form of [price] indexation." Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504 (1983); *Trostel*, 92 F.3d at 738. These two factors indicate that the phrase refers to the standard as of 1917. Although American Life argues that it would have been irrational in 1990 to refer back to 1917, it would be equally irrational for them to revive the gold clause in 1990 at all. For these reasons, I conclude that "present standard of weight and fineness" means the standard as of 1917. *See Fay Corp. v. Bat* [sic] *Holdings I, Inc.*, 651 F. Supp. 307, 308 (W.D. Wash. 1987) (concluding that "present standard of weight and fineness" meant the standard as of July 18, 1929, not August 28, 1982).

The final issue is the effect, if any, of American Life's 1997 Warranty Assignment and Assumption to Vulcan, specifically disclaiming the gold clause. I conclude that American Life may not unilaterally modify the terms of the 1917 lease by assignment, assumption, or novation. The Eighth Circuit characterized the 1990 assignment to American Life as a "transfer" of the "leasehold." Pursuant to Iowa contract law, an assignor is not released from liability by unilateral actions such as modification of contract terms during subsequent assignment. "One party to a contract cannot alter its terms unilaterally or without assent of the other party." *Davenport Osteopathic Hosp. Ass'n v. Hospital Serv., Inc.*, 154 N.W.2d 153, 157 (Iowa 1967); *B & H Apartments Partnership v. Tharp*, 466 N.W.2d 694, 696 (Iowa Ct. App. 1990). Because American Life did

not transfer the entire leasehold in the 1997 assignment and may not unilaterally modify the scope of the obligation of that leasehold, it remains obligated for payment of rent in accordance with the gold clause.

As a result, American Life is obligated to pay plaintiffs arrearages, including interest through June 30, 1998, in the amount of 5928.66 Troy ounces of fine gold as well as attorneys' fees and costs incurred in this litigation. American Life must pay future rent in the monthly amount of 92.72 Troy ounces of fine gold.

RULING AND JUDGMENT ORDERS

Plaintiffs' motion for Entry of Order in Accordance with the Opinion of the Eighth Circuit and motion for summary judgment is **GRANTED.**

IT IS THE JUDGMENT AND ORDER OF THE COURT that American Life specifically perform its obligation under the lease by paying plaintiffs arrearages, including interest through June 30, 1998, in the amount of 5928.66 Troy ounces of fine gold, and that American Life pay future rent in the monthly amount of 92.72 Troy ounces of fine gold.

IT IS FURTHER ORDERED that plaintiffs submit their attorneys' fee and cost application **on or before Friday, July 31, 1998.** Defendants shall file any objections **on or before Friday, August 14, 1998.**

Dated this 1st day of July, 1998.

/s/ Harold D. Vietor
HAROLD D. VIETOR
Senior U.S. District Judge

AMERICAN LIFE & CASUALTY INSURANCE COMPANY v. ANNE C. TROSTEL, ET AL.

97-1706

SUPREME COURT OF THE UNITED STATES

118 S. Ct. 2359; 1998 U.S. LEXIS 4170; 141 L. Ed. 2d 728; 66 U.S.L.W. 3800

June 22, 1998, Decided

PRIOR HISTORY:

Reported below: 133 F.3d 679.

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied. Justice Breyer took no part in the consideration or decision of this petition.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 95-3666

Anne C. Trostel; Harry A. Holman, Jr.; H. L. Van Metre; Charles H. Van Metre; Dorothy Hurley; Terrance M. Hurley, Cmdr.; Carol Sabey, Mrs.; Plaintiffs-Appellants	*	
Norwest Bank Fort Collins, N.A. Trustee-Appellant	*	Appeal from the United States District Court for the Southern District of Iowa.
v.	*	
American Life & Casualty Insurance Company; Defendant-Appellee	*	
Hawkeye Bank of Des Moines Movant	*	

Submitted: November 18, 1997
Filed: January 15, 1998

Before BOWMAN, BEAM, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

This case involving a gold clause in a real estate lease comes before us on remand from the Supreme Court for

further consideration in light of Congressional action subsequent to our decision of August 14, 1996. *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), *vacated*, 117 S. Ct. 939 (1997). We were asked to consider the impact of a statutory amendment which went into effect on September 30, 1996, but before oral argument Congress acted again to eliminate the language added in 1996. The parties have now briefed and argued their conflicting views about the possible impact of these legislative changes on this litigation.

The real estate lease covers a commercial building in downtown Des Moines, Iowa. It was originally entered into in 1917 to run for ninety nine years. The annual rent for the final forty five years was set at $18,000, and the lessor was given the option to demand payment in gold coin as a protection against future inflation. *See Trostel*, 92 F.3d at 738. During the lease period public policy changed in regard to gold. Congress declared in 1933 that gold clauses were against public policy and were therefore dischargeable dollar for dollar in United States currency. Joint Resolution of June 5, 1933, 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463) (codified as amended at 31 U.S.C. § 5118(d)(2)). More than forty years later the policy changed once more. On October 28, 1977, Congress amended the underlying statute to make gold clauses enforceable again if they were part of an obligation issued after October 27, 1977. Act of October 28, 1977, Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2)).

The lease was ultimately assigned in 1990 to American Life and Casualty Insurance Company (American Life), and in 1993 the lessors demanded payment of the

rental obligation in gold coin. American Life refused, and the lessors sought a declaratory judgment to enforce their demand. The district court granted summary judgment to American Life. We reversed after determining that the gold clause was enforceable under the 1977 statutory amendment because in the 1990 assignment American Life had assumed all obligations of the original lease. *Trostel,* 92 F.3d at 740-41.

Shortly thereafter Congress amended the underlying statute by adding a provision to the otherwise unrelated Economic Growth and Regulatory Paperwork Reduction Act of 1996. With the new amendment the statute read in pertinent part:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977. **This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement.**

31 U.S.C. § 5118(d)(2) (1996 amendment highlighted).[1]

The Supreme Court then granted certiorari and remanded the case to this court "for further consideration

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[1] The amendment also provided that it would not apply to gold clause obligations finally adjudicated before its passage.

in light of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, P.L. No. 104-208, Sec. 2609." 117 S. Ct. 939 (1997). A briefing schedule was established, stayed at request of both sides to permit discussions of possible settlement, and then reinstated with modified dates. Before oral argument could be heard, Congress acted again. This time it eliminated the provision it had added to the gold clause statute in 1996. Public Law 105-61, § 641. The legislation, signed into law on October 10, 1997, stated that:

> [s]ection 5118(d)(2) of title 31 United States Code, is amended by striking "This paragraph shall" and all that follows through the end of the paragraph.

Oral argument was then postponed to permit additional briefing on the implications of the new legislative action.[2]

The parties disagree as to the significance of the amendments. American Life asserts that the gold clause in the lease cannot be enforced because the 1996 amendment was written to be retroactive and the parties did not "specifically agree" to include the gold clause in the 1990 assignment. It therefore is only obligated to pay the lease amount of $18,000 per year on the building. It says the 1997 amendment has no effect here because it is not retroactive, citing *Landgraf v. U.S.I. Film Products,* 114 S. Ct. 1483 (1994). The lessors argue that the gold clause in this lease continues to have effect under either statute. They contend that the 1997 amendment is retroactive,

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[2] The parties have sought permission to file post-argument briefs addressing retroactivity issues, and their motions are granted.

making the 1996 amendment now irrelevant. They also say that even if the 1996 amendment applies to this lease, the gold clause is enforceable because American Life explicitly agreed in the assignment to be bound by "all of the terms and conditions" of the 1917 lease, and one of the terms of that lease was the gold clause.

American Life argues that the resolution of this case is a simple matter of applying the *Landgraf* holding which requires a clear expression of Congressional intent before a statute will be given retroactive effect. It is unable to cite a case, however, where the presumption was employed in a situation similar to the one here.[3] The 1996 amendment says that it "shall apply to any obligation issued on or before October 27, 1977 . . . ," thus indicating on its face a retroactive intent. *See Landgraf,* 114 S. Ct. 1483. The 1997 enactment simply states that the prior amendment is stricken. It does not use the type of language normally associated with retroactive effect. *See id.* Its apparent intent, however, is to eliminate the effect of the previous year's enactment, and to apply it in that way here would not implicate the policy interests underlying the presumption against retroactivity. This policy "has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id.* at 1500. As to the parties in this case, the interests of "fair

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[3] The statutory background in *Landgraf* was strikingly different from the one here. The statutory provisions at issue there were part of fundamental changes in civil rights law and resulted from a lengthy deliberative process. *See id.* at 1491, 1493. After Congress considered and rejected a version of the Civil Rights Act which had express retroactive language, it ultimately enacted a statute with none. *See id.* at 1491-92.

notice, reasonable reliance and settled expectations," *id.* at 1499, would weigh in favor of interpreting the 1997 amendment to return the law to its former state as it existed in 1990 at the time of the assignment to American Life.

The sequence of the legislative amendments and the involvement of these parties in that process are part of the full context of this case.[4] Each amendment reflected a desire to influence its outcome, and each was passed as a small item in an otherwise unrelated statute.[5] The 1997 amendment provided for the elimination of the entire 1996 amendment, and there is nothing to suggest that the language was carefully crafted to prevent its application here.

If a requirement of explicit statutory language commanding retroactivity is necessary for the 1997 amendment to have an effect on this case, however, then we must consider the effect of the 1996 amendment as controlling. The 1996 amendment required that a gold clause be specifically agreed to in order to be effective. The 1990 Warranty Assignment and Assumption agreement which controlled the assignment of the lease to American Life contains a reference to the original lease and provides that the assignor transfers the leasehold interest and that American Life, the assignee:

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[4] Initiatives by the parties in respect to the legislation were discussed at oral argument.

[5] The 1997 repeal was a small part of a voluminous act entitled "Treasury, Postal Service and General Government Appropriations, 1998."

> hereby accepts, assumes and agrees to be bound by all of the terms and conditions to be kept, observed, and performed by the lessee in said lease, as amended above described, from and after August 1, 1990. . . .

We previously held that this assignment amounted to a novation. This meant that the gold clause was enforceable under the 1977 statute since under Iowa law the 1990 novation amounted to a new obligation issued after the key statutory date. *See Klipp v. Iowa Grain Indemnity Fund Board*, 502 N.W.2d 9, 11 (Iowa 1993); *Eitzen's Estate v. Lauman*, 3 N.W.2d 546, 549-50 (1942). Under the 1996 amendment a gold clause is not enforceable "notwithstanding any assignment or novation" of a contract including such a clause unless the parties "specifically agree to include a gold clause in the new agreement." 31 U.S.C. § 5118(d)(2). The substituted contract must therefore demonstrate explicit intent to include a gold clause in the new obligation or it is not enforceable.

The substituted contract in this case satisfies the 1996 statutory requirement because it specifically included each clause of the original contract as a new term. American Life expressly assumed "*all* of the terms and conditions" (emphasis added) of the 1917 contract, and the gold clause in that contract was enforceable under the statute as it existed at the time of the 1990 assignment and as amended in 1996. Under Iowa law an assignment is a contract subject to the traditional rules of construction and where unambiguous, its words will be interpreted according to their common meaning. *Broyles v. Iowa Dep't of Soc. Services*, 305 N.W.2d 718, 721-22 (Iowa 1981) (citing 6A C.J.S. *Assignments* § 2 (1975); *Kinney v.*

Capitol-Strauss, Inc., 207 N.W.2d 574, 576-77 (Iowa 1973)). The terms of this assignment reveal the parties' intent to agree to include all original lease clauses, including the gold clause, in the new agreement created in 1990, thus satisfying the requirements of the 1996 amendment.

American Life claims that even if it specifically agreed to include the gold clause, the lessors did not. The statutory requirement is not satisfied unless "all parties" to the contract have agreed. American Life argues the lessors did not even realize that they could demand payment under the gold clause until 1991. The original lessor agreed in 1917 to all future assignments of the lease, however, and thus there was no need for them to agree to the gold clause contemporaneously with the 1990 novation. The statute only requires that all parties specifically agree to include a gold clause, not that all parties contemporaneously agree to include the clause. The original lessor specifically agreed to all clauses in the 1917 lease, including the gold clause, as well as to all future assignments, and lessors are the successors in interest. This is sufficient to satisfy the specific agreement requirement.

After reviewing the pertinent legislation subsequent to our earlier decision and the arguments raised by the parties, we conclude that the gold clause in this lease is enforceable and we reinstate our prior decision. Accordingly, we remand the case to the district court for further proceedings consistent with this opinion and *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996).[6]

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[6] This resolution makes it unnecessary to consider the lessors' arguments that the 1996 amendment is beyond the

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

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power of Congress under the Commerce Clause or that the lease is commercially impracticable or voidable because of a failure of a fundamental condition.

AM. LIFE & CASUALTY INS. V. TROSTEL, ANNE, ET AL.

96-964

Tuesday, February 18, 1997

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of the Economic Growth and Regulatory Paperwork Reduction Act of 1996.

No. 95-3666

Anne C. Trostel; Harry A. Holman, Jr.; H. L. Van Metre; Charles H. Van Metre; Dorothy Hurley; Terrance M. Hurly, Cmdr.; Carol Sabey, Mrs.; Plaintiffs/Appellants, Norwest Bank Fort Collins, N.A., Trustee/Appellant, v. American Life & Casualty Insurance Company, Defendant/Appellee, Hawkeye Bank of Des Moines, Movant.	Appeal from the United States District Court for the Southern District of Iowa

Submitted: April 10, 1996

Filed: August 14, 1996

Before BOWMAN, BEAM, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

This case involves a gold clause contained in a 99-year commercial property lease originally executed in 1917. American Life & Casualty Insurance Company is

the current lessee, having acquired the leasehold interest in 1990. The lessors, successors in interest to the original lessor, brought this contract action against American Life after it refused to pay its monthly rent installments in gold coin as specified in the original lease. The district court granted summary judgment in favor of American Life on the basis that the gold clause had been erased from the 1917 lease by a 1933 act of Congress. We reverse and remand.

On June 27, 1917 John Trostel entered into a lease agreement with Morris and Jacob Joseph for commercial property in Des Moines, Iowa.[1] The second paragraph of the lease set the amount of annual rent at $12,000 for the first five years of the lease, $15,000 for the next 49 years, and $18,000 for the remaining 45 years. It also provided that "at the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." In a separate paragraph, ninety days written notice was required as a condition precedent to the right of the lessor to demand payment in gold. Prior to the Depression era, gold clauses such as this were often included in long term rental agreements as a sort of price-indexing mechanism to protect a lessor from the effect of inflation. *See Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 947 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v.*

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[1] The leased property was described as:

> Lot Four (4) and the West one-third (W. 1/3) of Lot Three (3) in Block "C" of Commissioner's addition to the City of Des Moines, now within the corporate limits of the City of Des Moines, Iowa.

Frederick & Nelson Seattle, Inc., 896 F.2d 1227 (9th Cir. 1990).

As part of the lease, the Josephs agreed to construct a building on the property that was at least eight stories in height. The lease gave the lessees the right to transfer or assign their interest in the lease, and provided that once the building was completed a proper assignment would relieve them of any further personal liability under the lease. A fourteen story building was completed on the property in 1931 and is now known as the Des Moines Building.

The lease was amended in writing four times, by supplemental agreements in 1921, 1927, and 1930 and by an amendment in 1959. It was also supplemented by a written Agency Agreement dated September 24, 1959.[2] Among other things, the amendments related to the building construction deadline, rent increases, and the appointment of an agent for the collection and receipt of rent.[3] Each of these amendments was recorded. None of

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[2] The amendment in 1959 related to the adoption of this Agency Agreement.

[3] In May 1921 the deadline was extended for the construction of the building on the property. In July 1927 a further extension was added, but it was agreed that the rent would increase each year that the building was not completed after the amended deadline. A 1930 amendment provided that the new lessee would construct a 14 story building on the property and the rent would increase upon its construction, and appointed an agent for the collection and receipt of rent. In 1959 the rights of the parties regarding rent payment, insurance, and notice were simplified and clarified.

these modifications referred to the gold clause in the original lease.

In 1933 Congress passed legislation which affected all gold clauses. A joint resolution of Congress declared gold clauses to be against public policy and provided that "dollar for dollar" payments in United States currency would discharge any obligation. Joint Resolution of June 5, 1933, 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463) (codified as amended at 31 U.S.C. § 5118(d)(2)). This was one of a series of measures taken to stabilize the value of United States currency. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 295-97 (1935). During the same period, private ownership of gold was banned and the dollar was devalued. *See Rudolph v. Steinhardt*, 721 F.2d 1324, 1325-26 (11th Cir. 1983) (citing Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 Chicago L. Rev. 504 (1983)).

Subsequently in 1975 Congress repealed the ban on private ownership of gold, and in 1977 it passed an amendment to the 1933 gold clause statute. The amendment provided that the provisions of the 1933 statute would not apply to obligations issued after October 27, 1977. Act of October 28, 1977, Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2)).[4] In other words, as of October 28, 1977, it was once again legal to contract for payment in gold.

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[4] The 1977 amendment was originally codified at 31 U.S.C. § 463 (note), but in 1982 it was recodified at § 5118(d)(2) with only nonsubstantive changes. The statute currently provides:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment

The interest in the Des Moines Building lease has been transferred numerous times, and three of the transfers are considered relevant by the parties. On May 7, 1969, State Automobile and Casualty Underwriters (State Auto) acquired the leasehold estate pursuant to a Warranty Assignment and Assumption. In this document, State Auto agreed to be bound by all of the terms and conditions of the 1917 lease, as amended by specific written and recorded amendments. The parties agree that this transfer of interest was a novation that created a valid contract between lessors and State Auto and that released the prior lessee from any obligation.

On December 20, 1985, State Auto transferred the leasehold interest to The Statesman Group, Inc. (Statesman), which later transferred it to American Life on August 15, 1990.[5] The 1985 and 1990 transfers were each accomplished pursuant to a recorded Warranty Assignment and Assumption (warranty agreement) similar to that used in the 1969 transaction.

(dollar-for-dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

[5] State Auto, The Statesman Group, and American Life are related corporate entities. At the time of the 1969 lease transfer, The Statesman Group controlled State Auto by owning 100% of the stock of its attorney-in-fact, Automobile Underwriters Corporation. At the time of the lease transfer to American Life in 1990, the Statesman Group directly owned and controlled 100% of American Life stock.

The 1990 warranty agreement, which is the basis of the current lease, specifically incorporated the terms of the 1917 lease. It provided that Statesman:

> does hereby sell, transfer, assign and setover unto [American Life] the leasehold estate more particularly described in that certain lease dated June 27, 1917, and recorded in the office of the Recorder of Polk County, Iowa, on April 25, 1923, in Book 870, Page 497, wherein Joseph (sic) and Jacob Joseph are the Lessees; as amended by Supplemental Agreement dated May 6, 1921, recorded in the office of said County Recorder on April 25, 1923, in Book 870, Page 501; as further amended by Supplemental Agreement dated July 20, 1927, in Book 1011, Page 239; as further amended by Supplemental Agreement dated May 31, 1930, in Book 1107, Page 291; and as further amended by Amendment to Lease dated September 1, 1959, recorded in the office of said County Recorder on October 2, 1959, in Book 3190, Page 331; and as further supplemented by Agency Agreement dated September 24, 1959, recorded in the office of said County Recorder on January 4, 1963, in Book 3476, Page 476. . . .

Statesman also warranted that the lease "has not been cancelled, surrendered or modified except pursuant to those supplements above specified and that said Lease is in full force and effect." The document also provided that American Life as grantee:

> hereby accepts, assumes and agrees to be bound by all of the terms and conditions to be kept, observed and performed by the lessee in said lease, as amended above described, from and after August 1, 1990. . . .

In a letter dated December 27, 1993, an attorney for the lessors demanded payment of the rental obligation from American Life in gold coin pursuant to paragraph two of the 1917 lease.[6] On March 25, 1994 American Life delivered a cashier's check in the amount of $515,583.33 to the agent, along with a letter explaining that it represented the total rental obligation for the remaining lease term through the year 2016.[7] The letter claimed that the payment to the agent constituted a complete discharge of all rent owing. Although the 1917 lease required that rent be paid monthly in advance, American Life claims that requirement is superseded by language in the 1959 amendment related to the appointment of an agent for rent collection.

The lessors' attorney instructed the agent to hold the check for a week, after which he advised that the tender had been refused and instructed the agent to return the check to American Life. American Life has refused to accept the check back, and no rent has exchanged hands since that time.

The lessors filed this case against American Life on July 29, 1994, claiming that it had breached the lease

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[6] The attorney at that time represented parties holding 2/3 of the lessors' interests. He repeated the demand on March 29, 1994 on behalf of the lessors holding the remaining 1/3 interest.

[7] American Life was apparently attempting to avoid the operation of the gold clause by paying off the lease within ninety days of receiving notice. The 1917 lease required that the lessor give ninety days notice of its demand for payment in gold. Because notice was given December 27, 1993, the required payment in gold would start in April 1994.

contract by failing to make payments in monthly installments and in gold coin. They believe that the 1990 transfer of the leasehold interest to American Life was a new obligation entered into after the 1977 amendment which once again permitted requirements of payment in gold. In their view the gold clause in the 1917 lease was revived by the terms of the 1990 warranty agreement. American Life argued that the gold clause was not part of the current lease and that its prepayment of rent for the remainder of the lease term satisfied its rental obligation.

The district court granted summary judgment for American Life and dismissed the action. It held that even if a new obligation had been created in 1990, the gold clause could not have been incorporated in it by reference to the terms of the 1917 lease because the 1933 act had rendered that clause void and erased it from the 1917 lease. The lessors appealed, arguing that the gold clause had not been erased from the 1917 lease, that it was revived by what they refer to as a novation in 1990, and that American Life breached the lease by refusing to pay in gold coin and by failing to make rental payments in monthly installments. American Life responds that the gold clause was erased from the original lease by the act of Congress. It also claims that the gold clause was severed from the lease by a novation in 1969, that the current lease between lessors and American Life does not contain a gold clause because the 1990 transfer was not a novation, and that its prepayment of rent for the remainder of the 99 year term satisfied its rental obligation. It alternatively argues that if the gold clause is enforceable, the amount due should be based on the value of gold in 1990 rather than in 1917.

The issue we must determine is whether the current obligations between the parties include the gold clause contained in paragraph two of the 1917 lease. American Life's obligations under the lease were created by the 1990 warranty agreement between it and Statesman. On its face the warranty agreement incorporates all of the terms of the 1917 lease. That lease included the gold clause, of course, which was not specifically mentioned in 1990 as being relevant or not.

If the 1990 transfer of interest created a new obligation between lessors and American Life, it could legally contain a gold clause because it took place after the time that gold clauses were prohibited. *See* 31 U.S.C. § 5118(d)(2); *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 952 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990) (gold clause in 99-year lease entered into in 1929 revived by post-1977 novation of contract); *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d 521, 529 (Cal. Ct. App. 1995) (same). The 1990 transfer of interest would create such a new obligation if it constituted a novation of the lease. *See Fay Corp.*, 646 F. Supp. at 952; *Wells Fargo Bank*, 38 Cal. Rptr. 2d at 529.

American Life states in its briefs that the 1990 transaction was not a novation, but it does not dispute that a valid new obligation was formed. Instead it argues that the new obligation did not contain a gold clause. Iowa law describes a novation as "a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty." *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa 1993) (quoting, Restatement (Second) of Contracts § 280 (1981)). To prove

a novation under Iowa law, a proponent must show four elements: 1) a previous valid obligation; 2) agreement of all parties to a new contract; 3) extinguishment of the existing contract; and 4) validity of the new agreement. *Id.*

In this case there is no question that a valid previous lease obligation existed between Statesman and the lessors, that all parties agreed to a new contract,[8] that the obligations of Statesman were extinguished, and that a valid lease was created between lessors and American Life. American Life asserts that there was no novation as to the gold clause itself because the parties did not intend to incorporate it into the new lease. That argument involves how to interpret the terms of the existing contract, not whether a novation took place.[9] American Life does not suggest that the 1990 transaction was anything other than a novation.

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[8] The lessors' agreement to the novation arises from a clause in the 1917 lease which provided that the lessee could transfer the leasehold and that upon such transfer the lessee would be released from any personal liability. There is no claim here that the prior consent was invalid.

[9] Specifically, American Life claims there was no novation of the gold clause because the previous obligation between Statesman Group and lessors did to contain a gold clause. Even if the previous lease did not incorporate the gold clause, the terms of the new lease created by the novation are not limited to those in the previous lease. *See* Restatement (Second) of Contracts § 280 cmt. a (1981). American Life also claims that there was no meeting of the minds about whether to include a gold clause, but the explicit terms of the contract unambiguously suggest otherwise.

We conclude that under Iowa law the 1990 transfer of interest was a novation and that the parties were legally free to incorporate a gold clause into the lease agreement at that time. *See* 31 U.S.C. § 5118(d)(2); *Fay Corp.*, 646 F. Supp. at 952; *Wells Fargo Bank*, 38 Cal. Rptr. 2d at 529. That does not end the inquiry, however, because the parties did not explicitly mention gold or specifically identify each lease term. Rather, the 1990 warranty agreement simply incorporated all the terms and conditions in the 1917 agreement, and that lease had gold clause. American Life argues that the gold clause had been severed from the original lease by the 1933 act of Congress and that it was therefore no longer part of the 1917 lease terms.

The 1933 act providing that an existing (or future) obligation requiring payment in gold coin was dischargeable by payment in dollars. The parties disagree as to the effect of this statute on the gold clause in the 1917 lease. American Life says the statute amended the lease as a matter of law by removing the gold clause, but the lessors respond that the statute only made the clause unenforceable.

There is no question that between 1933 and 1977 the lessors could not successfully have demanded payment in gold coin from any lessee, but they claim that the 1917 clause was readopted by the 1990 warranty agreement and became effective pursuant to the 1977 statutory amendment. American Life admits that the 1933 act would not have prohibited the parties from contracting for a gold clause in 1990, but argues that the terms of the 1917 lease were permanently altered by the operation of the 1933 act, which had "erased" the gold clause from the 1917 lease.

Nothing in the terms of the 1933 act suggests that an existing gold clause would be "erased" or eliminated from the lease. Congress declared "any obligation which purports to give the obligee a right to require payment in gold" to be "against public policy" and stated that "no such provision shall be contained in or made with respect to any obligation hereafter incurred." Joint Resolution of June 5, 1933, Ch. 48, 48 Stat. 112, 113 (1933) (originally codified at 31 U.S.C. § 463) (currently codified as amended at 31 U.S.C. § 5118(d)(2)).[10] The 1933 act did not direct the existing gold clauses were to be severed from existing contracts, but instead rendered them unenforceable: it stated that every obligation, whenever it was incurred and whether or not it had a gold clause, was

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[10] The relevant portions of the Act state:

> Resolved by the Senate and House of Representatives of the United States of America and Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or particular kind of gold or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy and no such provision shall be contained in or made with respect to any obligation hereafter incurred. . . . Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar-for-dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. . . .

Joint Resolution of June 5, 1993, Ch. 48, 48 Stat. 112, 113 (1933) (originally codified at 31 U.S.C. § 463) (currently codified as amended at 31 U.S.C. § 5118(d)(2)).

dischargeable upon payment in United States currency. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935) (upholding 1933 act as valid exercise of Congressional power to establish a monetary system and determining that enforcement of gold clauses was incompatible with public interest).

The idea that the gold clause disappeared from the original lease is not supported by the specific text of the statute, which contemplates that contract might continue to contain gold clauses by referring to "every obligation heretofore or hereafter incurred." Moreover, the text of the 1977 amendment refers to obligations "containing" gold clauses.

American Life relies on cases stating broad principles such as "contract provisions that are contrary to public policy are void" to suggest that the 1933 statute operated to erase existing gold clauses. *See, e.g., McBrearty v. United States Taxpayers Union*, 668 F.2d 450, 451 (8th Cir. 1982) (agreements contravening public policy are void); *In re NWFX, Inc.*, 881 F.2d 530, 538 (8th Cir. 1989). The cases cited do not support its claim that existing gold clauses were rendered unrevivable by the 1933 act. None of the cases involve the incorporation of a once prohibited clause into a new contract by reference to an original document containing it.

The 1933 act did not magically erase the gold clause from the 1917 lease. Although it rendered the clause unenforceable, there is no reason that it could not be incorporated by reference in a new lease obligation entered into in 1990. *See Fay Corp.*, 646 F. Supp. at 952; *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d at 529.

American Life suggests that even if the clause were not voided in 1933, the 1969 transfer of the leasehold interest to State Auto severed the clause from the original lease. It claims that transaction was a novation that took place during the time that gold clauses were banned, but does not explain why that would delete the clause from the original lease or prevent later adoption of the original clause. The gold clause would of course not have been enforceable against State Auto because its obligation was entered into prior to the 1977 amendment. When it transferred the leasehold to Statesman in 1985, however, it did not purport to transfer its own obligations, but instead described the leasehold by the terms of the original lease. Similarly, the transfer of interest from Statesman to American Life in 1990 referred to the terms and conditions of the 1917 lease.

The 1917 lease contained an explicit gold clause, and neither the 1933 act nor the 1969 novation prevented its incorporation by reference into the terms of the new lease in 1990. The gold clause was valid at the time the original lease was executed, and although it was rendered unenforceable after 1933, it remained a written term of the lease as recorded and amended. The leasehold interest was transferred to American Life after the prohibition on gold clauses had been set aside by Congress, and the transfer specifically referred to the obligations described in the 1917 lease and its written amendments. Nothing in the 1990 warranty agreement indicated that American Life accepted only those obligations that had been legally enforceable against all previous lessees. Instead it specifically agreed to be bound by the obligations described in the 1917 lease and its written amendments.

American Life also suggests that the existing obligation between it and the lessors does not contain a gold clause because the parties did not intend to include a gold clause as a contract term in 1990. It claims that there is extrinsic evidence that the parties did not reach a meeting of the minds about incorporating a gold clause into the contract in 1990. That evidence includes affidavits to the effect that American Life did not intend to assume an obligation to pay rent in gold, as well as the fact that the lessors became aware that gold clauses could legally be incorporated into new agreements in 1991.

When construing a written contract under Iowa law, the intent of the parties controls, and unless there is ambiguity, intent is determined by what the contract itself says. *See Howard v. Schildberg Constr. Co.*, 528 N.W.2d 550, 554 (Iowa 1995); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 600 (Iowa 1990). The language of the 1990 warranty agreement is not ambiguous. American Life agreed to be bound by the terms of the 1917 lease as recorded and as amended by the specified recorded amendments. The intent of American Life to be bound by these terms, which included an explicit gold clause, is expressed in clear and unambiguous language, and the contract thus should be enforced as written. *See Howard*, 529 N.W.2d at 554.

American Life also claims that its advance payment of rent on the remaining years of the lease satisfied its obligations. The 1917 lease required that the rent be paid to the lessor monthly in advance. American Life concedes that such a provision generally precludes a lessee's right to prepay rent, but claims that the 1959 amendment to the lease superseded it and allowed prepayment.

The 1959 amendment was made to "simplifiy and clarify the arrangements as to payment of rent, the handling of insurance policies, the deposit of evidences of payment of taxes and other items, the designation of Agents, the giving of Notices, and the treatment of Lessee's option to purchase the fee title to the real estate." It made specific changes to several paragraphs of the original lease including paragraph 31, which had been added by amendment in 1930. Paragraph 31 provided that an agent would be appointed, that its duties were to be "essentially ministerial," and would "include the collection and receipt of rents under said lease." The amendment provided that delivery to the agent "of checks, money, notices, documents, written information, and the like," would "constitute delivery thereof to Lessee or Lessors." It further stated:

> The payment of rent by the Lessee to such an Agent shall constitute a complete discharge of the rent so paid, and the Lessee shall not be required to take notice of the termination of any such Agent's authority of the appointment of a successor unless notified in writing thereof in the manner in this lease provided for the service of notices.

American Life argues that the 1959 amendment removed the requirement that rent must be paid monthly or at least creates an ambiguity whether it must. By its terms, however, the 1959 amendment relates only to whom the rent should be paid, and does not imply that the amount or timing of the payment would be affected. The contract as amended is unambiguous that the rent must be paid to the agent monthly in advance. American

Life could not fulfill its obligations under the contract by prepaying the rent for the remainder of the term.

The parties also disagree on the proper value of any gold payment required. American Life claims the requirement of payment in gold "of present weight and fineness" would refer to the value in 1990, rather than in 1917. The lessors believe that the value of gold in 1917 was intended. The district court did not consider this issue because it held that the gold clause could not have been revived as a matter of law. Since the term relating to "present weight and fineness" is ambiguous, resolution of the issue will involve a factual inquiry. It should therefore be addressed in the first instance by the district court.

For the stated reasons, the judgment is reversed and the cases is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ANNE C. TROSTEL, et al.,	CIVIL NO. 4-94-70494
Plaintiffs,	RULINGS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT, AND ORDER OF DISMISSAL
v.	
AMERICAN LIFE & CASUALTY INSURANCE COMPANY,	(Filed Sep. 29, 1995)
Defendant.	

Plaintiffs, owners of interests in a parcel of land in downtown Des Moines, Iowa, are successors in interest to John Trostel, lessor under a lease agreement executed in 1917. Plaintiffs bring suit against defendant, the current lessee, seeking specific performance of a clause in the lease allowing the lessors to require payment of the monthly rent in gold coin. Defendant moves for summary judgment. Plaintiffs resist and move for partial summary judgment. Arguments were heard and the motions are submitted.

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

> if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Johnson v. Schopf*, 669 F. Supp. 291, 295 (D. Minn. 1987).

Summary judgment is appropriate only where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322-23; *Kopp v. Samaritan Health Center, Inc.*, 13 F.3d 264, 268 (8th Cir. 1993). On a motion for summary judgment, the court views all the facts in the light most favorable to the nonmoving party, and gives that party the benefit of all reasonable inferences that can be drawn from the facts. *Kopp*, 13 F.3d at 269; *United States v. City of Columbia, Mo.*, 914 F.2d 151, 153 (8th Cir. 1990).

Facts

The parties are in agreement as to most of the basic facts. In 1917, a ninety-nine year lease was entered into between John Trostel, lessor, and Morris and Jacob Joseph, lessees. The agreement is currently comprised of the original Lease dated June 27, 1917, and four amendments: a Supplemental Agreement dated May 6, 1921; a Supplemental Agreement dated July 20, 1927; an Amendment to Lease dated May 31, 1930; and an Amendment to Lease

dated September 1, 1959. There is also an agency agreement, pursuant to certain terms in the 1959 amendment, which was entered into on September 24, 1959.

Terms of the Lease

Many of the leased terms are relevant to the cross motions, including the following:

> Second. The Lessees covenant and agree to pay to the Lessor, as rent for said demised premises, during the first five years of said term, the annual rental of Twelve Thousand Dollars ($12,000.00), to be paid to the lessor in equal monthly installments of One Thousand Dollars monthly installments of One Thousand Dollars ($1,000.00), each in advance, on the first day of each month during said period of five years.

The rent was scheduled to increase after five years and again after the fiftieth year. The rent term was amended by the 1930 Amendment and the rent prior to the dispute leading to this case was $23,000 per year. Paragraph "Second" of the 1917 Lease also includes the so-called "gold clause" at the heart of this dispute:

> At the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness.

The "gold clause" was modified by paragraphs "Third" and "Twenty-fifth":

> Third. It is expressly understood and agreed by and between the parties that no acceptance by the Lessor of any currency, legal tender, checks, coin, money, or value whatever, except

> standard gold coin of the United States of America, as hereinbefore specified, in payment of any installment of rent, shall be construed to be a waiver on the part of the Lessor to demand the payment of any other unpaid installment of rent in standard gold coin * * * .
>
> Twenty-fifth. As a condition precedent to the right of lessor to demand payment in gold coin of amounts becoming due to him under this lease, he shall give ninety days' written notice thereof to lessees.

The original Lease also required that lessees construct a building on the property that was to meet certain specifications and be completed by a date set in the Lease. The specifications and required completion date were amended by the 1921 Supplemental Agreement and the 1927 Supplemental Agreement. The 1927 Supplemental Agreement also amended the right of assignment, making reference to the required building:

> Twenty-second. Lessees shall have the right to transfer or assign this lease, but said transfer or assignment shall be without force and effect until the assignment thereof has been filed of record in the office of the County Recorder in and for Polk County, Iowa, and until notice of such assignment has been given to said Lessor or his authorized agent. The Lessees, however, shall remain liable under this lease, notwithstanding such assignment, until the completion of said eight-story building * * * whereupon their personal liability shall cease.

Finally, the 1959 Amendment makes clear that payment or rent or service of any notices with the joint agent constitutes delivery to the lessor and the lessee. Payment

of rent to the agent constitutes complete discharge of the rent.

Chronology of Events

In 1917, the original Lease was signed. Amendments were made in 1922, 1927, and 1930.

In 1931, a fourteen-story building was completed on the subject property, fulfilling those conditions in the Lease relating to or linked to such improvements.

In 1933, Congress passed a Joint Resolution, invalidating gold clauses, which provided, in pertinent part:

> (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount of money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.

Act of June 5, 1933, 48 Stat. 112-113 (originally codified at 31 U.S.C. § 463; codified as amended at 31 U.S.C. § 5118) (hereinafter the "1933 Act").

In 1959, the Lease was again amended, and the parties entered into the agency agreement.

In 1969, National Realty Investors, then the lessee, executed a "Warranty Assignment and Assumption" in which it agreed to

> sell, transfer, assign and set over unto Automobile Underwriters Corporation, an Iowa Corporation, Attorney-in-Fact for State Automobile and Casualty Underwriters * * * the leasehold estate more particularly described in that certain Lease dated June 27, 1917 * * * .

It is undisputed that this transfer was in the form of a novation and, therefore, a new contract.

In 1977 and 1982, Congress passed P.L. 95-147 and P.L. 97-258, amending 31 U.S.C. § 5118(d)(2) to read:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in the United States coin or currency that is legal tender at the time of payment. *This paragraph does not apply to an obligation issued after October 27, 1977.*

(emphasis added).

In 1985, State Automobile and Casualty Underwriters ("State Auto") executed a "Warranty Assignment and Assumption" transferring "the leasehold estate more particularly described in that certain Lease dated June 27, 1917" and amendments to The Statesman Group, Inc. ("Statesman").

In 1990, Statesman, using the same language, transferred its interest to defendant, American Life and Casualty Insurance Company ("American Life").[1]

On December 27, 1993, plaintiffs first gave notice to defendant of their intent to exercise the option to be paid in gold. On March 25, 1994, defendant delivered to the joint agent a check for $515,583.33, representing the outstanding balance of the lease at the current rent through the expiration date, August 31, 2016. In a letter dated March 29, 1994, plaintiffs informed the joint agent and defendant that they would not accept the offer of prepayment and returned the check to the agent. Defendant refused to accept the returned check and has made no further rent payments.

Discussion

Plaintiffs attempt to enforce, for the first time, the "gold clause" contained in the 1917 Lease. To do so, all of the following must be established. First, the 1933 Act that invalidated gold clauses must have rendered such clauses unenforceable rather than totally voiding the clauses. Second, because the 1969 novation took place when gold

---

[1] In 1969, Statesman owned 100% of the stock of Automobile Underwriters Corporation (AUC), the Attorney-in-Fact for State Auto. The relationship between Statesman, State Auto, and AUC remained unchanged through the date of the 1985 assignment. As of the date of the 1990 assignment, Statesman owned 100% of the stock of defendant American Life. The reasons for the 1985 and 1990 assignments were not undertaken with an intent to change the terms of the lease, but rather for reasons internal to the organization of Statesman.

clauses were still prohibited, the gold clause must have survived the 1969 novation, allowing that provision to be transferred after 31 U.S.C. § 5118 was amended to permit such provisions. Third, one or both of the 1985 and 1990 transfers would have to be a novation. Finally, the post-1977 novation must have created a valid new contract that included the gold clause among its terms.

The 1933 Act Renders Gold Clauses Void

Interpretation of the 1933 Act and its effect on the post-Act viability of gold clauses has not been addressed by the Eighth Circuit. Upon a careful review of the language of the 1933 Act I believe that the 1933 Act, by its terms, does more than merely render gold clauses unenforceable. Gold clauses already in existence were "declared to be against public policy," and with respect to future contracts, the Act made clear that "no such provision shall be *contained in or made* with respect to any obligation hereafter incurred."

The public policy was evidently a strong one: gold clauses were prohibited for more than forty years, and in 1934, Congress went even further, banning the private ownership of gold. *Fay v. BAT Holdings I*, 646 F. Supp. 946, 948 (W.D. Wash. 1986). As a general rule, an agreement or term of an agreement that contravenes public policy is void. *McBrearty v. U.S. Taxpayers Union*, 668 F.2d 450, 451 (8th Cir. 1982); *see also In re NWFX, Inc.*, 881 F.2d 530, 538 (8th Cir. 1989) ("[I]n most other jurisdictions, contracts which are contrary to public policy are void."); *cf. Jordan v. Iowa Dept. of Transp.*, 468 N.W.2d 827, 830 (Iowa 1991) (recognizing "void as against public policy" defense, but

finding facts of case did not establish a violation of any clear public policy).

Interpreting the 1933 Act as voiding gold clauses rather than rendering them unenforceable is also the most logical reading of the Act's prohibition against such clauses being "contained in" contracts. *See* Black's Law Dictionary 1573 (6th ed. 1990) (defining void as "null; ineffectual; nugatory; having no legal force or binding effect * * * .")

I conclude that the 1933 Act voided all extant gold clauses, including the clause in the 1917 Lease. Moreover, as the 1933 Act prohibited gold clauses from being "contained in" future agreements, the clause would have been severed from the Lease by the 1969 novation that occurred while the prohibition against gold clauses was in effect.

Gold Clause Not Reinstated After 1977 Amendment

The only way plaintiffs can enforce the gold clause against the current lessee is if the clause was somehow reinstated. It is clear from the language of the 1977 and 1982 amendments to the 1933 Act that the renewed allowance of gold clauses was not retroactive. *See* 31 U.S.C. § 5118(d) (the language, "[t]his paragraph does not apply to an obligation issued after October 27, 1977," was inserted rather than the prohibition being stricken). For plaintiffs to prevail there must have been some event after October 27, 1977 that renewed the gold clause.

Because the 1933 Act voided the gold clause, there are no circumstances that could restore its validity other

than the clause being part of a new, bargained-for exchange. *See* Black's Law Dictionary 1573 (6th ed. 1990) ("void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that *nothing can cure it*") (emphasis added); *see also School Dist. No. 1 of Silver Bow County v. Driscoll*, 568 P.2d 149, 154 (Mont. 1977) (" 'A 'void thing' is no thing; it has no legal effect whatsoever and no right whatever can be obtained under it or grow out of it. In law it is the same thing as if the 'void thing' had never existed.' Thus * * * even a subsequent act of the legislature could not cure something that was void.") (quoting *Lowery v. Garfield County*, 208 P.2d 478 (Mont. 1949) (internal citations omitted). While it is undisputed that the 1985 and 1990 assignments referenced the 1917 Lease, that Lease could not have included among its terms an assignable gold clause. When the clause was *voided* in 1933, it was, in effect, erased from the 1917 Lease.

Wells Fargo, Fay Cases Distinguished

Plaintiffs rely on two cases, *Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521 (Cal. App. 1995) and *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd*, 896 F.2d 1227 (9th Cir. 1990), that give support to their position.

These cases are not controlling on this court. I have, of course, carefully considered the reasoning each presents. I respectfully disagree with the basic premise in each case that the gold clause was merely unenforceable and dormant, not void, after the 1933 Act.

Because I find that the gold clause in the 1917 Lease was rendered void by the 1933 Act, I conclude that the post-1977 transfers of the leasehold interest, even if they were valid novations, could not have revived the gold clause by mere reference to the 1917 Lease. Reactivation of the gold clause in a post-1977 Lease would require an overt agreement between the lessor and lessee to do so. Accordingly, defendant's motion for summary judgment will be granted and plaintiffs' motion for partial summary judgment will be denied.

Rulings and Order

Defendant's motion for summary judgment is GRANTED.

Plaintiffs' motion for partial summary judgment is DENIED.

IT IS ORDERED that plaintiffs' complaint is DISMISSED.

Dated this 29 day of September, 1995.

/s/ Harold D. Vietor
HAROLD D. VIETOR,
District Judge
Southern District of Iowa

RELEVANT PROVISIONS OF THE 1917 LEASE

At the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness.

* * *

Twenty-second. Lessees shall have the right to transfer or assign this lease, but said transfer or assignment shall be without force and effect until the assignment thereof has been filed of record in the office of the County Recorder in and for Polk County, Iowa, and until notice of such assignments has been given to said Lessor or his authorized agent. The Lessees, however, shall remain liable under this lease, notwithstanding such assignment, until the completion of said eight story building, thereupon their personal liability shall cease.

Twenty-third. In case the Lessor, his executor, administrator, successor or assigns shall desire to sell said premises, then the Lessees shall have the first option to purchase the same on the same terms and conditions as given to any other party. Said lessees shall have ten days within which to exercise said option after notice in writing to said Lessees by said Lessor of his intention to sell.

Twenty-fourth. All provisions, conditions and covenants of this lease, whether it be so expressed or not, shall bind and inure to the benefit of (as the case may be) the heirs, successors and executors, administrators and assigns of the respective parties hereto.

Twenty-fifth. As a condition precedent to the right of lessor to demand payment in gold coin of amounts

becoming due to him under this lease, he shall give ninety days' written notice thereof to lessees.

WARRANTY ASSIGNMENT AND ASSUMPTION

(Filed Mar. 17, 1997)

KNOW ALL MEN BY THESE PRESENTS: That American Life & Casualty Insurance Company, an Iowa insurance corporation, ("Grantor") in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration in hand paid does hereby sell, transfer, assign and setover unto Vulcan Life Insurance Company, a corporation organized and existing under the laws of the State of Alabama ("Grantee") the leasehold estate ("Lease") more particularly described in that one certain Lease dated June 27, 1917 (except both Grantor and Grantee expressly disclaim any intent to sell, transfer, assign, setover or otherwise comply with the provisions of the Lease that contemplate or require that payments under the Lease will be paid in gold coin of the United States of America of or equal to the standard of weight and fineness prevailing in 1917) (such provisions hereinafter shall be referred to as the "Gold Clause"), and recorded in the office of the Recorder of Polk County, Iowa, on April 25, 1923, in Book 870, Page 497, wherein Joseph Trostel is the Lessor and Morris Joseph and Jacob Joseph are the Lessees; as amended by Supplemental Agreement dated May 6, 1921, recorded in the office of said County Recorder on April 25, 1923, in Book 870, Page 501; as further amended by Supplemental Agreement dated July 20, 1927, in Book 1011, Page 239; as further amended by Supplemental Agreement dated May 31, 1930, in Book 1107, page 291; and as further amended

by Amendment to Lease dated September 1, 1959, recorded in the office of said County Recorder on October 2, 1959, in Book 3190, Page 331; and as further supplemented by Agency Agreement dated September 24, 1959, recorded in the office of said County Recorder on January 4, 1963, in Book 3476, Page 476, under which the Central National Bank & Trust Company of Des Moines, Iowa, now First Interstate Bank of Des Moines, N.A., serves as agent for and on behalf of both the Lessor and the Lessee and particularly extending and relating to the following described real estate and the buildings and improvements erected thereon, situated in Polk County, Iowa, to-wit:

> Lot Four (4) and the West One-Third of Lot Three (3) in Block C in Commissioner's Addition to Fort Des Moines, now included in and forming a part of the City of Des Moines, Iowa,

And said Grantor hereby covenants with the Grantee hereof, its successors and assigns, that it holds the aforedescribed leasehold interest, that it has good and lawful authority to sell and convey the same, that subject leasehold interest is free and clear of all liens and encumbrances whatsoever except as may be hereinafter stated and that it covenants to warrant and defend subject leasehold interest against the lawful claims of all persons whomsoever and that without limitation of the generality of the foregoing makes the following specific warranties:

1. That it is not in default under the terms of said Lease and that all of the terms, covenants, undertakings and provisions of said Lease (except the Gold Clause)

have been performed and that it has the full right, without restriction, to transfer and assign said Lease (except the Gold Clause).

2. That said Lease has not been cancelled, surrendered or modified except pursuant to those supplements above specified and that said Lease (excepting the Gold Clause) is in full force and effect.

3. That the improvements located on the premises are constructed entirely upon the premises demised by said Lease and are not being used or operated in violation of any zoning ordinance, law or regulations of and City, County, State or other governmental authority having jurisdiction.

4. That there are no mechanic's liens filed against the premises and that no work has been done upon subject premises out of which lien rights arise and with respect to which a mechanic's lien could be filed.

5. That the fixtures and articles are in good working condition and order.

6. That the Grantor has taken all necessary action to authorize the assignment and transfer of said leasehold interest and that the officer or officers executing this assignment is properly authorized to do so for and on behalf of the Grantor.

7. That Grantor has not been given a notice under subject Lease that any fee owner of the premises desires to sell his or her fee interest therein.

8. The Grantee, its successors and assigns in consideration of the Assignment and Transfer to it of the said Lease hereby accepts, assumes, and agrees to be bound by all of the terms and conditions to be kept, observed and performed by the Lessee in said Lease (except the Gold Clause), as amended above described, from and after August 1, 1990, and covenants and agrees to faithfully comply with, carry out and perform all of the terms and covenants on the part of the Lessee under said Lease as so modified from and after said date (except the Gold Clause).

IN WITNESS WHEREOF, the Grantor and Grantee have caused this instrument to be duly executed this 13th day of MARCH, 1997.

AMERICAN LIFE & CASUALTY INSURANCE COMPANY

By /s/ Lawrence W. Inlow
Exec-Vice President

By /s/ Michael A. Colliflower
Senior-Vice President

BUYER

VULCAN LIFE INSURANCE COMPANY

By /s/ Rollin M. Dick
Executive Vice President

By /s/ Robert E. Burkett, Jr.
Vice President

SELLER

STATE OF INDIANA)
) SS:
COUNTY OF HAMILTON)

On this 13th day of March, 1997, before me, the undersigned, a Notary Public in and for said County and said State personally appeared Lawrence W. Inlow and Michael A. Colliflower, to me personally known, who, being by me duly sworn, did say that they are the Executive Vice President and Senior Vice President, respectively, of American Life & Casualty Insurance Company; that said instrument was signed on behalf of said corporation by authority of its Board of Directors; and that the said Lawrence W. Inlow and Michael A. Colliflower as such officers acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it and by them voluntarily executed.

(Notary Seal) /s/ Barbara J. Revell
Barbara J. Revell
Notary Public in and for said
County and State
My Commission Expires:
7-14-2000
Residing in Boone County, IN

STATE OF INDIANA)
) SS:
COUNTY OF HAMILTON)

On this 13th day of March, 1997, before me, the undersigned, a Notary Public in and for said County and said State personally appeared Rollin M. Dick and Robert E. Burkett, Jr., to me personally known, who, being by me

duly sworn, did say that they are the Executive Vice President and Vice President, respectively, of Vulcan Life Insurance Company; that said instrument was signed on behalf of said corporation by authority of its Board of Directors; and that the said Rollin M. Dick and Robert E. Burkett, Jr. as such officers acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it and by them voluntarily executed.

(Notary Seal)

/s/ Barbara J. Revell
Barbara J. Revell
Notary Public in and for said County and State
My Commission Expires:
7-14-2000
Residing in Boone County, IN

Supreme Court, U.S.
FILED
JUN 4
OFFICE OF THE CLERK

No. 98-1796

In The

Supreme Court of the United States

AMERICAN LIFE & CASUALTY INSURANCE COMPANY,

Petitioner,

v.

ANNE C. TROSTEL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF PARTIES AND CORPORATE AFFILIATES PURSUANT TO RULE 29.6

Norwest Bank Colorado, N.A. is a party respondent. Norwest Bank Colorado, N.A. serves as Trustee for one Robert Sears, one of the heirs of John Trostel. Norwest Bank Colorado, N.A. has no non-wholly owned subsidiaries. Its parent corporations are Wells Fargo & Company, Independent Bancorp of Arizona, Inc., Mountain Bancshares, Inc. and Metropolitan Bancshares, Inc.

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STATEMENT OF THE CASE

In 1917, a real estate lease was entered into by John Trostel, as lessor, concerning a commercial building in Des Moines, Iowa. The term of the lease was ninety-nine years, and the lease contained a gold clause which provided that "[a]t the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." This clause was used, as was typical in that day, as a price-indexing mechanism to protect against the effects of inflation.

In 1933, Congress declared that gold clauses were unenforceable and against public policy and made such obligations payable in United States dollars. In 1977, Congress again acted by amending the underlying statute and reinstating the enforceability of gold clauses which were part of obligations issued after October 27, 1977. 31 U.S.C. § 5118(d)(2) (hereinafter referred to as "Section 5118(d)(2)").

Petitioner in this action, American Life and Casualty Insurance Co. ("American Life"), assumed all obligations of this lease by novation in 1990, and now opposes the enforcement of the gold clause by Respondents, the heirs of John Trostel. Payment to Respondents in gold coin was demanded in 1993. American Life has paid no rent since that time.

The United States Court of Appeals for the Eighth Circuit found the gold clause at issue to be enforceable under the 1977 statutory amendment reinstating the enforceability of such clauses because the 1990 novation to American Life constituted a new contract, by which

American Life had assumed all obligations of the original 1917 lease. *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), *vacated*, 117 S. Ct. 939 (1997) (hereinafter *"Trostel I"*). The Eighth Circuit remanded the case for factual inquiry by the district court regarding the meaning of the gold clause term "present [standard] of weight and fineness" for purposes of entry of judgment in favor of Respondents. *Trostel I* at 743.

Shortly thereafter in 1996, Congress amended the underlying statute by adding a provision to an otherwise unrelated act, which read in pertinent part:

> This paragraph does not apply to an obligation issued after October 27, 1977. **This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement.**

31 U.S.C. § 5118(d)(2) (1996 amendment emphasis added). The amendment also provided that it was not applicable to obligations "finally adjudicated" before the amendment's passage.

Petitioner requested that this Court grant certiorari as to the effect of the 1996 amendment on the Eight Circuit's opinion, and more significantly, whether, regardless of the 1996 amendment, the Eighth Circuit improperly interpreted American Life's 1990 assumption of the leasehold obligation to be a novation which constituted an obligation issued after October 27, 1977 thereby reviving the enforceability of the gold clause. This Court then granted certiorari, vacated the decision of the Eighth

Circuit, and remanded to the Eighth Circuit for further consideration in light of the 1996 amendment. 117 S. Ct. 939 (1997).

Before the matter could be reconsidered by the Eighth Circuit, Congress again acted. The legislation, enacted on October 10, 1997, provided that the language added in the 1996 amendment was stricken. Pub. L. No. 105-61, § 641. After considering the 1996 amendment and its 1997 repeal, the Eighth Circuit reinstated its previous decision. *Trostel v. American Life & Cas. Ins. Co.*, 133 F.3d 679, 681 (8th Cir. 1998) (hereinafter *"Trostel II"*). The Eighth Circuit concluded that the gold clause is enforceable as a consequence of the 1990 novation in light of either amendment, reasoning that even if the 1996 amendment remained applicable to this case, the parties had specifically agreed to include a gold clause by agreeing to be bound by "all the terms and conditions" of the original lease and concluding that the 1997 repeal was retroactive. *Trostel II* at 681-82. The Court again reiterated its prior conclusion that the 1990 novation was an obligation issued after October 27, 1977. *Id.*

Again American Life sought a grant of certiorari from this Court, questioning the effects of the 1996 and 1997 statutory amendments and refreshing its argument that the Eighth Circuit's opinion in *Trostel I* was erroneous because the 1990 novation did not constitute a new obligation issued after October 27, 1977. This Court denied certiorari. 118 S. Ct. 2359 (1998).

In the interim, American Life sought to unilaterally modify their obligation under the gold clause by assigning the lease in 1997 to its sister corporation, Vulcan Life

Insurance Company ("Vulcan"), specifically disclaiming the gold clause from the assigned obligation assumed by Vulcan. American Life asserted that it had, by way of the 1997 assignment, "turned off" the gold clause and eliminated it from the lease obligation entirely.

With all of Petitioner's appeals regarding the applicability of Section 5118(d)(2) having been exhausted by virtue of the Eighth Circuit's opinion in *Trostel II*, reinstating *Trostel I*, and this Court's denial of Petitioner's 1997 Petition for writ of certiorari, the district court entered judgment in favor of Respondents. The district court considered the parties' positions with respect to the meaning of the term "present standard of weight and fineness" in accordance with the instruction of the Eighth Circuit in *Trostel I*, to determine the precise amount of American Life's continuing rental obligation. The district court concluded that the gold clause mandated that American Life must satisfy their continuing rental obligation in "gold coin of the United States" in accordance with the 1917 standard of weight and fineness, not the 1990 standard of weight and fineness. The district court rejected argument from American Life that the 1997 assignment to Vulcan had eliminated the gold clause from the rental obligation.[1]

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[1] Rule 15 requires Respondents to point out that the Petition contains at least two significant misstatements of fact on pages 10 and 11. First, the parties never reached agreement concerning how the face amount of the rental obligation would be precisely calculated or what the value of gold was in 1990. The district court did not address the issue and American Life presented no evidence on the issue. Secondly, American Life asserts that the district court "made no effort to explain how the

American Life then appealed to the Eighth Circuit again, raising the following issues: whether the term "present standard of weight and fineness" means the standard in 1990, or the standard as it existed in 1917; and whether the 1997 assignment to Vulcan, excluding the gold clause, had eliminated the clause from the future rental obligation? The Eighth Circuit affirmed the district court's judgment regarding these issues, rejecting American Life's arguments.

REASONS FOR DENYING THE WRIT

Consideration of the "Questions Presented" by American Life's Petition for Writ of Certiorari is not proper since those questions were not "pressed or passed upon" by the Eighth Circuit in its third consideration of this case. The very simple reason that the Eighth Circuit did not consider or pass upon those questions is because the Eighth Circuit *had already decided* those issues in *Trostel I*, reinstated that decision in *Trostel II*, and this Court's denial of a writ of certiorari following *Trostel II* completed all proper federal appellate consideration of those questions.

1997 assignment differed from the 1990 assignment, which modified the lease to incorporate by reference the gold clause." To the contrary, the district court stated specifically that "[b]ecause American Life did not transfer the entire leasehold in the 1997 assignment and may not unilaterally modify the scope of the obligation of that leasehold, it remains obligated for payment of rent in accordance with the gold clause." Petition, pp. 16a-17a.

None of the reasons offered by American Life in its Petition for Writ of Certiorari satisfy this Court's standards for accepting a case for review. This Court requires, pursuant to Rule 10, "compelling reasons" for granting certiorari, and this case presents none of the "compelling reasons" which deserve this Court's discretionary review. Contrary to Petitioner's misrepresentations, there is no split of legal authority concerning the interpretation of Section 5118(d)(2) between any federal court of appeals and another federal court of appeals or state court of last resort. Petitioner simply misconstrues the opinions of courts that have applied the plain language of Section 5118(d)(2). Therefore, even if American Life's redundant presentation of questions concerning Section 5118(d)(2) were properly presented to this Court, Rule 10(a) is not satisfied and American Life should be denied a writ of certiorari.

Buried in American Life's "Reasons for Granting the Writ" are the questions most recently decided by the Eighth Circuit although those issues are not contained in the "Questions Presented" by American Life's Petition. These issues are the only questions timely and properly raised to this Court. They present only questions of Iowa contract law interpretation which do not properly invoke this Court's discretionary review. Therefore none of the compelling considerations required by Rule 10 are presented by the Petition, and American Life's writ should be DENIED.

I. THE "QUESTIONS PRESENTED" BY THE PETITION ARE NOT PROPERLY CONSIDERED BECAUSE THIS COURT HAS ALREADY DENIED CERTIORARI REGARDING THOSE ISSUES.

American Life's appeal to this court for review of any question regarding interpretation of Section 5118(d)(2) and whether the 1990 novation to American Life is an "obligation issued" after October 27, 1977 is redundant. Contrary to Petitioner's unsupported assertion that the Eighth Circuit's opinion in *Trostel II* was "interlocutory in nature," the *Trostel II* opinion was a final adjudication as to American Life's obligation under the gold clause and the enforceability of that gold clause under Section 5118(d)(2). The Eighth Circuit's *Trostel II* opinion specifically reinstated the final judgment of *Trostel I*. It is established that a "final decision is one that ends the litigation on the merits." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (citations omitted). Even though a factual inquiry remained to be conducted by the district court, on remand pursuant to *Trostel I*, to determine the precise meaning of the terms of the gold clause in order to determine the precise amount of the rental obligation, that factual inquiry was only necessary because the district court had not previously reached that issue. That procedure does not make the Eighth Circuit's opinion in *Trostel II* "interlocutory" since "[a] question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order." The district court's determination of the meaning of the gold clause term "present standard of weight and fineness" was only necessary in

order to execute the Eighth Circuit's final decision that American Life was bound by the gold clause. *Trostel II* found that the 1996 and 1997 amendments to Section 5118(d)(2) ultimately had no effect on the outcome of the Court's previous analysis and reinstated the judgment awarded to Respondents in *Trostel I*. Therefore, there is nothing "interlocutory" about either *Trostel I* or *Trostel II*. American Life filed a timely petition for certiorari seeking review of the Eighth Circuit's final adjudication on the merits concerning the enforceability of the gold clause under Section 5118(d)(2). This Court then appropriately rejected that petition and denied American Life a writ of certiorari. 118 S. Ct. 2359 (1998). The Petition before the Court now simply seeks a "second bite" at the same apple from which this Court has determined American Life's questions did not merit a first bite. Therefore, no writ should be granted to American Life.

II. EVEN IF THE EIGHTH CIRCUIT'S *TROSTEL I* INTERPRETATION OF SECTION 5118(d)(2) COULD BE CONSIDERED, NO SPLIT OF AUTHORITY EXISTS REGARDING INTERPRETATION OF THIS STATUTE.

Rule 10(a), and cases construing this rule, demonstrate that "[t]he absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari." *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., opinion in denial of certiorari). American Life mischaracterizes existing opinions in attempting to craft a split of authority where none exists. There is no "embarrassing conflict of opinion and authority between the circuit courts of appeal," *NLRB v. Pittsburgh S.S. Co.*,

340 U.S. 498, 502 (1951) (citations omitted), and instead the cases relied upon by American Life clearly establish the consistent opinion that the *novation of a lease* containing a gold clause after October 27, 1977 does indeed render the gold clause enforceable pursuant to Section 5118(d)(2).

American Life seeks to re-characterize a long-term lease as a "long-term debt obligation" analogous to a long-term bond in order to convince this Court that a split of authority exists between the Eighth and Ninth Circuits regarding exactly when an obligation is "issued" pursuant to Section 5118(d)(2). Even if American Life does not comprehend the distinction between the assignment of a lease and the novation of a lease, and the distinction between a bond and a lease, the Eighth and Ninth Circuits have demonstrated their understanding of these distinct legal concepts and applied Section 5118(d)(2) uniformly.

The Ninth Circuit determined in 1990 that the novation of a lease, in which a new obligor is substituted for the original obligor, was "a new obligation for the purposes of [Section] 5118(d)(2)." *Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990). The Eighth Circuit considered the Ninth Circuit's reasoning and similarly concluded in *Trostel I* that American Life was similarly substituted by novation in 1990, and thus Section 5118(d)(2) made the gold clause enforceable by Respondents against American Life.

The Ninth Circuit returned to Section 5118(d)(2) in *Adams v. Burlington Northern R. Co.*, 80 F.3d 1377 (9th Cir. 1996) to explain that a bond containing a gold clause was

a distinctive type of "financial instrument[ ] inherently different from leases," and clarifying that the negotiable nature of bonds required a different conclusion regarding their date of "issuance" for purposes of Section 5118(d)(2). *Id.* at 1382.[2] The Ninth Circuit specifically distinguished the bond presented in *Adams* from the lease presented in *Fay Corp.* Because the Eighth Circuit's opinion in *Trostel I* is consistent with the Ninth Circuit's opinion in *Fay Corp.*, which was further explained and unchanged by the Ninth Circuit's analysis in *Adams*, no split of authority is presented by *Adams*.

American Life also asserts that the Ninth Circuit's opinion in *Grand Avenue Partners, L.P. v. Goodan*, 160 F.3d 580 (9th Cir. 1998) creates a conflict between the Eighth and Ninth Circuits. A careful reading of the *Grand Avenue*

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[2] Petitioner also attempts to craft a split of authority between the Eighth Circuit and the Alaska Supreme Court based on that court's opinion in *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry.*, 629 P.2d 947 (Alaska 1982). The *Gold Bondholders* court determined, in analysis relied upon by the Ninth Circuit in *Adams*, that the negotiable character of a bond negated the bondholder's argument that subsequent sale of the bond constituted "novation" for purposes of determining when the bond obligation was issued under Section 5118(d)(2). In *Adams*, the Ninth Circuit agreed with the Alaska court's reasoning that "determinations regarding the issuance date of a bond [for purposes of Section 5118(d)(2)] should 'focus on the legal structure of the bonds and not novation.' " *Adams*, 80 F.3d at 1382 (citing *Gold Bondholders*, 649 P.2d at 950). Therefore, American Life's assertion that *Gold Bondholders* demonstrates a split of authority is erroneous for the same reasons presented here that demonstrate that no split of authority exists between the Eighth and Ninth Circuits by virtue of *Adams*.

opinion demonstrates that just the opposite is true. The *Grand Avenue* court was required to construe the language of the post-October, 1977 assignment which contained the *limited* release of the lease's original obligor from "all direct liability hereunder accruing" after the assignment of the lease to the new obligor. The issue at hand in *Grand Avenue* was whether a *novation* had occurred, as opposed to an assignment and assumption of only part of the original obligation. The *Grand Avenue* lessor relied upon the Eighth Circuit's reasoning in *Trostel I*, but the Ninth Circuit concluded properly that *Trostel I* did not affect the court's analysis because the facts of *Trostel I* were, and still are, different from those facts presented in *Grand Avenue*. The Ninth Circuit affirmed the district court's conclusion that no novation had occurred after considering the application of California statutes and contract law construing novations and assignments. Thus, the Ninth Circuit recognized what American Life does not understand after three opinions from the Eighth Circuit: that the distinction between an assignment, as presented in *Grand Avenue*, and a novation, as presented here, governs the applicability of Section 5118(d)(2).

The Ninth Circuit's analysis in *Grand Avenue* therefore further demonstrates that the Eighth and Ninth Circuits *agree* that the *novation* of a *lease* constitutes a new obligation under Section 5118(d)(2) and holds that a partial assignment does not constitute a new obligation. American Life argued in *Trostel I* that no novation had occurred, and the Eighth Circuit rejected that argument and found, pursuant to Iowa contract law, that a novation

had occurred.[3] Therefore the Eighth Circuit's reasoning in *Trostel I* is directly in line with that of the Ninth Circuit as

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[3] The contract law of the various states which have considered Section 5118(d)(2) is reasonably consistent in recognizing when a novation has occurred and what effect that novation has on the parties to the new obligation. *See Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d 521 (Cal. Ct. App. 1995) (construing California contract law on novation); *Fay Corp. v. BAT Holdings, I, Inc.*, 646 F. Supp. 946, 950 (W.D. Wash. 1986) (construing Washington law on novation); and *Trostel I*, 92 F.3d at 740 (construing Iowa law on novation based on review of *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa. 1993 (quoting Restatement (Second) of Contracts § 280 (1981)))). Generally put, state law characterizes a novation to have occurred upon the *complete* substitution of a new obligor who assumes the entire obligation due to the obligee. The scope and nature of the obligation is unchanged, but a new obligor has stepped into the shoes of the original obligor, and thus a new obligation has been created. This is often called a "simple novation," and the original obligor is relieved of all liability to the obligee. The terms of the original obligation may, as in this case, waive the consent of the obligee before a *simple* novation may occur.

In contrast, the new obligor's assumption of anything *less than* all of the obligation due to the original obligee is not a simple novation, but instead the original obligor remains liable to the obligee for any "remainder" of the obligation not assigned to the new obligor. Because the obligee remains entitled to complete satisfaction of the bargained-for performance, both the new obligor and the original obligor remain liable to the obligee, or consent of the obligee is required to modify the scope or nature of the original obligation. In *Grand Avenue*, the Ninth Circuit was faced with this type of assignment of the leasehold obligation, since the original obligor retained liability to the obligee even after the assignment was executed, so the Ninth Circuit concluded that, pursuant to California contract law, no novation had occurred. The Ninth Circuit thereafter rightly concluded that *Trostel I* had no effect on the

explained and applied in *Fay Corp.*, *Adams*, and *Grand Avenue*, and no split of authority exists to support a writ of certiorari.

American Life further contends that a uniform federal definition of Section 5118(d)(2)'s term "obligation issued" is necessary, and that certiorari should be granted because application of state contract law will create inconsistent definitions of the same term equivalent to a reviewable split of authority. But all courts which have construed when an obligation is issued for purposes of Section 5118(d)(2) have deemed it necessary to determine when the obligation was "entered into" contractually. American Life concludes that *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d 521 (Cal. Ct. App. 1995), creates "perverse incentive" for lessors to seek enforcement of gold clauses. But it was the *Wells Fargo* court that stated exactly why the interpretation of Section 5118(d)(2)'s "obligation issued" language is a matter of state contract law interpretation. The *Wells Fargo* court analyzed the legislative history and intent behind Section 5118(d)(2) and plainly stated that the phrase "obligation issued" was unambiguous and that because the legislative history demonstrated that the statute was aimed to address contracts "entered into" after the enactment of the bill, those gold clauses "remain subject to traditional laws of contract, as judicially interpreted" to determine precisely when the obligation was "entered into." *Wells Fargo*, 38 Cal. Rptr. 2d at 526, 527. It is a settled principle of

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court's analysis since a novation did occur in this case by virtue of American Life's 1990 assumption of the *entire* obligation of the 1917 lease from Statesman.

statutory construction that "absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13 (1994). As the *Wells Fargo* court obviously understood, state contract law controls interpretation as to when a contract was "entered into" since "there exists no federal law of construction of contracts." *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990). Therefore, the application of state contract law to determine when an obligation is issued does not create an inconsistent application of Section 5118(d)(2).

III. ENFORCING CONTRACTS AS THEY ARE WRITTEN AND REQUIRING SOPHISTICATED ASSIGNEES TO READ THE TERMS OF CONTRACTS TO WHICH THEY OBLIGATE THEMSELVES WILL NOT HAVE "PROFOUND CONSEQUENCES" ON THE COMMERCIAL REAL PROPERTY MARKET.

American Life worries that lessors "armed with ancient gold clauses" will paralyze the commercial real property marketplace with their efforts to enforce "previously meaningless and long-forgotten" gold clauses against "unwitting" assignees. This "gold rush," argues American Life, will result in "profound consequences" which should invoke the discretionary review of this Court. What is profound, indeed, about this case is that a sophisticated entity such as American Life would knowingly and voluntarily assume the terms of a long-term lease, expressly binding itself to perform the obligations defined by the terms of that lease, *without even reading the lease*. What is also profound is that lessors will actually

receive the benefit of their bargain, by enforcement of gold clauses for the purpose they were intended to serve – to protect against inflation. While the consequences of the Eighth Circuit's three prior decisions in this case may be profound between these parties, no wide-spread economic catastrophe will result from the enforcement of this lease as it is written and as the parties to the lease intended it to operate in 1917. American Life's writ should be denied.

IV. THE EIGHTH CIRCUIT'S MOST RECENT OPINION ONLY INVOLVES QUESTIONS OF IOWA STATE CONTRACT LAW THAT DO NOT WARRANT REVIEW BY THIS COURT.

The only questions presented by American Life which are timely appealed and properly included in the Petition also do not warrant this Court's review because they are simply complaints regarding the Eighth Circuit's interpretations of Iowa contract law. The Eighth Circuit concluded that the lease's contractual term "present standard of weight and fineness" means the 1917 standard of weight and fineness, as opposed to the 1990 standard of weight and fineness. In reaching this conclusion, the Eighth Circuit relied on its previous factual conclusion in *Trostel I* that the 1990 novation to American Life expressly incorporated all of the terms of the 1917 lease, and the Eighth Circuit applied Iowa contract law to conclude that American Life's intent in 1990 had no effect on the meaning of the word "present" as originally included in the 1917 lease.

Additionally, the Eighth Circuit concluded that Iowa contract law does not permit American Life to simply

choose to relieve itself of its gold clause obligation by unilaterally modifying the terms of the lease to eliminate the gold clause by assigning all of the obligations of the 1917 lease, except the gold clause, to Vulcan. Even if the Eighth Circuit had erroneously interpreted Iowa contract law, misapplied a properly stated rule of Iowa contract law, or reached an erroneous factual finding, such error would not be a sufficient basis under Rule 10's demanding standards that American Life demonstrate a "compelling reason" for discretionary review.

CONCLUSION

Petitioner has failed to present issues which are proper or sufficient to invoke the discretionary review of the Supreme Court of the United States. For that reason, and all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

AMERICAN LIFE &
CASUALTY INSURANCE COMPANY,

Petitioner,

v.

ANNE C. TROSTEL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 STATEMENT

American Life and Casualty Insurance Company (ALCIC), now known as Conseco Annuity Assurance Company (CAAC), owns 98% of Vulcan Life Insurance Co. CAAC's parent is Jefferson National Life of Texas, which is wholly owned by CIHC Incorporated. CIHC Incorporated is wholly owned by Conseco, Inc. Conseco, Inc. is a publicly traded corporation.

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REPLY BRIEF FOR THE PETITIONER

Respondents' Brief in Opposition ("Opp.") fails to contest, and thus effectively concedes, several key issues that demonstrate that plenary review is amply warranted in this case. Specifically, Respondents do not deny that the Eighth Circuit's interpretation of the federal statute governing gold clauses cannot be squared with its plain language and purpose; that the Eighth and Ninth Circuits have given the statutory term "issue" diametrically opposed meanings with respect to bonds and leases even though there is no justification in the statute for this split in approach; that the Eighth Circuit's approach makes the meaning of a federal law dependent on state common law where suit is brought; and that under the Eighth Circuit's decision, unwitting assignees of long-term leases containing gold clauses will be subject to dramatic and unintended increases in their rental obligations.

Despite these major concessions, Respondents do advance several specific arguments that warrant a brief reply.

1. Unable to deny the significance of the issues presented by this case, Respondents' principal argument is that the petition for certiorari is "redundant" because the issues raised in the questions presented were resolved by the Eighth Circuit in its prior decision in *Trostel II*. Opp. at 7. Respondents contend that this Court's prior denial of certiorari to review the interlocutory order entered by the Eighth Circuit in *Trostel II* precludes review of these issues. Yet, it is well established that the lack of finality in

the judgment below may "of itself alone furnish[ ] sufficient ground for the denial of the application" for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Consequently, this Court has repeatedly recognized that the denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment. *See, e.g., id.; Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring) ("Our action does not, of course, preclude [petitioner] from raising the same issues in a later petition, after final judgment has been rendered.").

Respondents seek to avoid these settled principles by claiming that the order that was the subject of the prior petition for certiorari was not interlocutory. Respondents candidly acknowledge that this prior order remanded the case to the district court for a "factual inquiry" as to the "meaning of the terms of the gold clause" in order to determine the amount of rent due. Opp. at 7. Respondents neglect to mention, however, that the import of these proceedings on remand was to determine whether Petitioner's rent was to remain unchanged or was to be increased twenty-fold. Given the significance of this issue and the prospect that its resolution on remand would render application of the gold clause largely inconsequential, Respondents' contention that the order "end[ed] litigation on the merits" is plainly incorrect, as the Eighth Circuit's order in no way represented a final determination of the merits of this case. Opp. at 7. Indeed, in similar contexts, this Court has concluded that an order requiring a remand on a remedial issue is interlocutory. *See, e.g., Hamilton-Brown Shoe*, 240 U.S. at 258; *Brotherhood*

of Locomotive Firemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"); *see also Virginia Military Inst.*, 508 U.S. at 946 (decision below not final where Court of Appeals "remanded the case to the District Court for a determination of an appropriate remedy").[1] In short, the issues set forth in the questions presented are properly before this Court.

2. The decision below clearly conflicts with this Court's approach to common-law terms used in federal statutes. A federal court interpreting a federal statute does not apply the common law of the individual state where the dispute arises as if it were sitting in diversity. Rather, it must arrive at a uniform meaning of the common-law term consistent with the text and purpose of the federal law. *Reves v. Ernst & Young*, 494 U.S. 56, 71 (1990) ("We are unpersuaded that Congress intended the Securities Acts to apply differently to the same transactions

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[1] Respondents' reliance upon *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988), is misplaced. In that case, the Court merely concluded that a final decision had been rendered when the only remaining issue related to the amount of attorney's fees to be awarded to the *prevailing* party. The Court's decision in *Budinich* offers no support to Respondents' contention that an order requiring a remand as to the proper interpretation of a contract and the amount of damages due under that contract is final.

depending on the accident of which State's law happens to apply.").[2]

Respondents continue to defend the Eighth Circuit's complete reliance on Iowa law in this case. Opp. at 13-14. In a footnote, Respondents assure this Court that the law of novation is "reasonably consistent" among the several states, Opp. at 12-13 n.3, and therefore poses no threat of inconsistent results under section 5118(d)(2).

Nothing could be further from the truth. As the district court noted in *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990), jurisdictions are split on whether consent to a novation must be contemporaneously made by all parties or may be made in advance by one or both parties. *Fay*, 646 F. Supp. at 951-52. *Compare Scott v. Wyoming Oils*, 75

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[2] Respondents cite *United States v. Shabani*, 513 U.S. 10, 13 (1994), for the unremarkable proposition that when Congress uses a common-law term, "absent contrary indications" it intends to adopt the common-law definition of that term. Opp. at 14. *Shabani* held that the conspiracy provisions of 21 U.S.C. § 846 adopted the common-law rule that no overt act need be proved to complete the crime of conspiracy. *Shabani* does not help Respondents here. In fact, if Respondents' view had prevailed in *Shabani*, whether or not the federal drug conspiracy statute required proof of an overt act would have depended on the law of conspiracy in the state where the crime was committed. Moreover, as this Court has recognized, common-law terms in federal statutes must be interpreted consistent with the text and purpose of the federal law. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) ("[C]ommon-law principles may not be transferable in all their particulars to Title VII."). Here, the common law of contract in Iowa has been applied to defeat the purpose of the federal statute.

P.2d 764 (Wyo. 1938) (consent to novation must be made at time of substitution), *and Emerson-Brantingham Implement Co. v. Sawyer*, 242 S.W. 1007 (Mo. Ct. App. 1922) (same), *with Shadeland Dev. Corp. v. Meek*, 489 N.E.2d 1192 (Ind. App. 1986) (lessor may agree to novation in advance in lease contract), *and Sans Souci v. Division of Florida Land Sales & Condominiums*, 421 So. 2d 623 (Fla. Dist. Ct. App. 1982) (explicitly disagreeing with Wyoming Supreme Court in *Scott* in holding no need for contemporaneous consent of parties for a novation).

This difference in state contract law would affect the outcome in this very case. The Court of Appeals found the lessor's consent to a novation in a clause contained in the original 1917 lease. *Trostel I*, App. 38a n.8. In other states a different result would obtain because there must be contemporaneous consent by all parties to a novation. Congress cannot have intended the application of section 5118(d)(2) to turn on these vagaries of state contract law.

3. Respondents attempt to explain away the widely disparate applications of section 5118(d)(2) in the federal and state courts by reference to the differences in state common law in the various states where the disputes arose. Opp. at 11-13. The attempt only highlights the need for this Court to grant review and arrive at a uniform federal interpretation of the words "obligation issued" contained in section 5118(d)(2).

For example, *Grand Avenue Partners, L.P. v. Goodan*, 160 F.3d 580 (9th Cir. 1998), involved a long-term commercial lease like the one at issue in this case. *Grand Avenue Partners* also involved a corporate reassignment of

the lease pursuant to a clause authorizing such reassignment without the contemporaneous consent of the lessor. As in this case, no reference was made to the gold clause in the post-1977 reassignment. Yet, section 5118(d)(2) operates to create gold clause liability in this case and not in *Grand Avenue Partners*. Respondents argue this result is proper under California and Iowa contract law and the distinction between an assignment and a novation. Opp. at 11.

Under a uniform federal interpretation of the phrase "obligation issued" with reference to the purposes of the statute, there would be no gold clause liability in either *Grand Avenue Partners* or this case, because the only obligation "issued" was the original pre-1933 lease containing an unenforceable gold clause. No new obligation "issued" because, as a matter of federal law, such a new obligation must entail an *agreement* – a meeting of the minds – with respect to the gold clause to be bound by a new gold clause obligation. Only this interpretation is consistent with the common-law definition of "issued" and the federal purpose behind the law, namely, to allow contracting parties to *knowingly choose to employ* gold clauses after 1977.

Similarly, Respondents attempt to explain away the conflicting results in bond cases by reference to common-law distinctions between bonds and leases that "required a different conclusion regarding the date of their 'issuance' for the purposes of section 5118(d)(2)." Opp. at 10 (citation and footnote omitted). Again, this proves Petitioner's point. Under Respondents' view, the word

"issue" in section 5118(d)(2) becomes a linguistic chameleon that changes meaning depending on the State and the type of "obligation" involved.

Neither the Ninth Circuit's decision in *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377 (9th Cir.), *cert. denied*, 519 U.S. 864 (1996), nor the Alaska Supreme Court's decision in *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry. Co.*, 649 P.2d 947 (Alaska 1982), can be reconciled with the Eighth Circuit's approach in this case. In *Adams*, the plaintiffs could point to many supplemental indentures executed by successors in interest to the original issuers of the bonds which unequivocally assumed all the obligations and liabilities associated with the bonds. *See Adams*, 80 F.3d at 1379 (assignee executed 1987 Supplemental Indenture that obligated it to assume all payments under the bonds "according to their tenor . . . "). This is exactly the type of complete substitution of a party and complete adoption of all provisions of the previous contract that the court below found to be a novation and therefore to constitute a new "obligation issued" after 1977 under section 5118(d)(2). The *Adams* court, however, rejected the "novation" approach and held that "bonds are 'issued' within the meaning of the 1977 amendment when they are delivered to the first holder." 80 F.3d at 1381. *Adams* reached this result, at least in part, by looking to the language and purpose of the federal statute. *Id.* at 1380-81.

Similarly, in *Gold Bondholders* the Alaska Supreme Court rejected the argument that a transfer of a pre-1933 gold bond constituted a novation and therefore the issuance of a new obligation containing a gold clause. Despite the fact that the bonds contemplated issuance of a "new

registered bond" to a transferee upon surrender of the old bond, the court refused to find a new issuance under section 5118(d)(2). The court noted that the "new registered bond" clause was "drafted in 1895, and it was the purpose of Congress in enacting 31 U.S.C. § 463 to vitiate such obligations insofar as they required payment in gold specie. We are unpersuaded by appellants' argument that the bonds were first issued to them in 1980 and that, therefore, they come within the provisions of the 1977 act." 649 P.2d at 950-51. The Alaska Supreme Court's reasoning is obviously not limited to bonds. It applies to all unwitting "novations" based on assignment clauses drafted prior to 1933. Respondents cannot dispute the fact that this case would have been decided differently if brought before an Alaska court.

4. Finally, Respondents seek to shield the Eighth Circuit's decision from review by attempting to minimize the importance of this case. Significantly, Respondents do not dispute that there are numerous long-term leases, many running well into the next century, that will be affected by the disposition of this case. *See* Petition at 23 n.4. Nor do Respondents contest the fact that the Eighth Circuit's decision will operate to saddle the unwitting assignees of these leases with dramatic and unintended rental increases. Indeed, under the Eighth Circuit's decision, even prospective tenants who are fully aware of the otherwise moribund gold clauses will not be able to avoid reviving the gold clause obligations if they assume such a lease. *See* Petition at 24. Nevertheless, Respondents wistfully posit that landlords will not utilize this leverage to dictate terms to their tenants and prospective assignees. Yet, there is every reason to believe that the commercial

market for real property covered by such long-term leases either will be frozen entirely or will be distorted by the demands of lessors armed with ancient gold clauses and the Eighth Circuit's decision.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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